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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. 341

CURTIS, COLLINS & HOLBROOK COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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In the Supreme Court
OF THE
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October Term, 1922

No. 341

Curtis, Collins & Holbrook Company,
Appellant,

vs.

The United States of America,
Appellee.

BRIEF FOR APPELLANT.

This appeal, together with appeals in twenty-three companion suits, is from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, reversing the decree of the District Court of the United States for the Northern District of California, Second Division, and remanding the cause with instructions to enter a decree cancelling the patent issued by the United States of America to Edward L. Cooksey (275 Fed. 670).

We do not feel that the statement of the case by the Circuit Court of Appeals, found upon pages 1392 to 1397 of Vol. III of the Record, is sufficiently full to give an adequate understanding of appellant's position and rights in this litigation, and we therefore submit the following:

Statement of Facts.

The allegations of the several bills touching the alleged fraud are substantially the same, and a statement of those contained in this case will suffice for all of them. The bill alleges that the application and sworn statement of the entryman, filed in the Susanville Land Office, was false in that he swore that he was applying for the land for his own exclusive use and benefit, whereas he had, before making his application, agreed to convey the land to Charles E. Gregory and the Curtis, Collins and Holbrook Company, a California corporation; that Gregory and the Company knew of the alleged fraud, and requested and procured the entryman to make the entry for their use and benefit (R. p. 6). The answers denied these allegations and in addition set up the defense of bona fide purchaser for value. The Master's Report, to which we will have frequent occasion to refer, and which is a clear and comprehensive statement of the law and the facts, is found upon pages 66-309 of the Record. The Master's Reports, and each of them, were in all respects approved by the District Court (R. 400), and decrees entered dismissing all the bills (R. 406).

In the 24 cases where the Curtis, Collins and Holbrook Company was adjudged an innocent purchaser, appeals were sued out by the Government to the Circuit Court of Appeals for the Ninth Circuit, which reversed the judgment of the District Court and directed that a judgment be entered cancelling the patent (R. p. 1392).

FACTS COMMON TO ALL THE CASES.

We will in the main take our statement of "facts common to all the cases" from the report of the Master, omitting matters not material to, or explanatory of, questions arising in this or any of the appeals.

In 1896 George E. Tuman, a timber cruiser, went into Plumas County, California, to examine timber and determine whether any considerable amount of it was on public land, but did nothing further at that time. He first met Charles H. Holbrook, who figures prominently in this case, in 1898. In 1901 Tuman resumed his investigation of timber lands, extending them to Plumas and Tehama counties; at that time he was worth $9000 or $10,000. The object of his trip in 1901 was to cruise as much vacant land as possible, with a view of inducing some capitalist to furnish funds to acquire them from the Government through the use and application of forest reserve lieu scrip (R. pp. 173-174), which was permissible under an Act of Congress passed in 1897 (30 Stats. at Large, p. 36).

In June, 1901, Tuman and one Golden, whom he had associated with him, but who had no money, having gotten together a considerable list of lands, began to look about for someone to aid them in securing financial assistance, and to this end Holbrook was approached, who at that time also had no money but was experienced in timber operations and was relied upon to put them in touch with the necessary capital.

Golden and Holbrook made a fruitless journey in 1901 to Wisconsin with a view to securing the needed assistance. Golden was then bought out. In November of 1901 Holbrook made a second trip East, going to Warren, Pennsylvania. While there he met D. G. Curtis, who introduced him to his father, J. G. Curtis, and T. D. Collins, who were men of means and interested in timber and other enterprises in Pennsylvania. Holbrook showed them his list of lands which Tuman had cruised, with the estimates of timber upon them and proposed that they should buy the land from him at $7.50 an acre, and thereby furnish him with the necessary money to buy what is commonly known as forest lieu scrip, then worth about $4.00 or $5.00 an acre, the land to be turned over to Curtis and Collins and the difference between the price of the scrip bought by their money and the price they paid being Holbrook's profit. During the course of these negotiations, Tuman, at Holbrook's request, wired Holbrook that a named third party was ready to make the purchase on the same terms proposed. This

telegram was false and intended to accellerate the consummation of a bargain with Curtis and Collins. The list of lands which Holbrook then had amounted to something over 42,000 acres. Accordingly, Holbrook's proposition was accepted and a contract in writing executed, after which Holbrook returned to California. Later it appeared that the original agreement in some of its details was unworkable and, accordingly, in December, Holbrook made a second journey to Pennsylvania and a new contract was executed between him and Curtis and Collins under date of December 19, 1901. This agreement, Defendant's Exhibit "B", is transcribed in full in the Record at page 1275 *et seq.*, and as the Master says is of importance as showing the relations of the parties (R. p. 174).

We quote the following from the Master's report:

> "By this agreement Holbrook agrees to sell to and have the title thereto vested in Curtis & Collins, their heirs or assigns, in the manner set forth, 42,380 acres of timber lands for $7.50 an acre, making the total cost of said lands to the second party plus $2250 interest the sum of $315,600. Holbrook agrees to obtain the forest reserve base land by purchase in the amount named and make selection of the 42,380 acres described in his list of cruised lands attached as a schedule, 'the title to the same to be secured by the said parties of the second part, Curtis and Collins, their heirs or assigns.' It was provided that the scrip should be conveyed to G. Howard Thompson as a trustee, Thompson being an employee then of the Bank of California, who were bankers for both parties. Curtis and Collins agreed to deposit in the Bank

of California on December 31, 1901, the sum of $200,000 to purchase the necessary forest reserve scrip, to be applied by the bank on the written directions of Holbrook, together with the certificate of Charles A. Shurtleff, attorney at law, as to the title. Further funds were to be deposited as needed. Mr. Thompson was at Holbrook's request to deed the base lands to the United States and make application for the lieu tracts in the attached schedule, Holbrook furnishing the descriptions. It further provided as follows, (R. p. 175):

'The trustee, providing he shall have received the notice from Holbrook that he has been fully paid hereinafter provided for, shall at the request of Curtis and Collins either before or after receipt of patent therefor, deed said lieu lands to Curtis and Collins, their heirs or assigns, or to any person or corporation they may in writing jointly direct * * * Curtis and Collins agree that when Holbrook shall have obtained the 42,380 acres of forest reserve and have had the same deeded to the trustee, or when he shall have secured the title to 42,380 acres of timber land in Plumas County and Tehama County by having the forest reserve deeded to said trustee, or otherwise procured the title thereto, or sooner, if the parties to this agreement consent, to form a corporation under the laws of California having for its purpose the purchasing and acquiring of said and other timber lands and cutting the timber thereon and manufacturing and selling the same' (R. p. 176).

The corporation was to have a capital stock of $500,000 divided into 5000 shares. It was further provided that:

'On the completion of the incorporation the second parties (Curtis and Collins) shall deed and convey, or cause to be conveyed to said

corporation all of said 42,380 acres and receive in full payment thereof 3156 shares of the capital stock fully paid up and issued in their name; and the balance, 1844 shares, shall remain in the treasury of the corporation and shall not be sold for less than par' (R. p. 177).

In other words, the land concerned was to go first to a trustee who, when directed by Holbrook that he had been paid, was to deed the lieu lands to Curtis and Collins, or, if the corporation had been formed, to the corporation provided they directed him to do so. The corporation was to be formed as soon as the requisite quantity of forest reserve had been conveyed to the trustee when thereupon Curtis and Collins would have the trustee vest the title to the lands in the corporation and receive the full amount involved, $315,600, in stock of the corporation in payment therefor (R. p. 177).

Provision was made that Holbrook should be an original incorporator and a director as long as he owned any stock. Holbrook's payments were provided as follows:

'That when the 42,380 acres shall have been deeded to the said trustee, or the title to said acreage secured to said second parties by acquiring forest reserve or through any other method or source, Curtis and Collins will pay to Holbrook the balance of the purchase price (that is to say, over and above the $200,000 to be advanced to purchase the scrip), the sum of $115,600, as follows: They shall deliver to him properly indorsed and fully paid up and free from assessments and all other liens, 789 shares of stock, from $5000 to $10,000 in cash and the balance in notes of Curtis and Collins, payable six months from date, with interest, in full payment of said balance' (R. p. 178).

Holbrook was thereupon to give to Curtis and Collins a notice to the trustee that he had been

fully paid. It was provided that if Curtis and Collins advanced for the purchase of said lands an amount in excess of $200,000, the principal sum of the promissory notes was to be reduced in an amount equal to such excess. If not all of the $200,000 was necessary to purchase the 42,380 acres the balance was to be paid to Holbrook. It was also provided in the contract that if Holbrook could not secure title to the whole of said 42,380 acres of land by forest reserve, he might secure such titles through any other legal means or source, but in no event should he or the persons deeding the same be paid for lands thus acquired until the title thereto was certified to be good by Shurtleff, an attorney at law, and deeded to the trustee, and when so certified the bank should pay for the land.

As far as this scrip land is concerned, it is seen that the corporation was to acquire title to the land through Curtis and Collins, Holbrook to get his stock as well as his money profits and the money to finance his purchase of forest reserve base from Curtis and Collins. The title of the land acquired by the corporation did not actually pass through Curtis and Collins, being held by a trustee, who was likewise a trustee for Mr. Holbrook. In effect it was a transaction of purchase and sale between Holbrook as vendor, and Curtis and Collins as vendee, but with the formation of the corporation Holbrook was required to take a part of his profit in the stock which represented the land conveyed to the corporation. In this transaction the parties have been seen to be dealing at arm's-length (R. p. 179).

Holbrook thereupon set about, with the assistance of his son, Charles H. Holbrook, Jr., to acquire the necessary scrip. He met considerable difficulty. After getting together a few thousand acres in varied lots Holbrook was ready to abandon the enterprise; when a large

block of scrip was offered by the Southern Pacific Railroad Company. This was bought and the amount of 42,380 acres called for by the contract secured by appropriate action in the Land Office. In addition some thousands of acres beyond that amount were secured by the use of scrip. This transpired in the late winter or early spring of 1902. The scrip was obtained at various prices, from about $3.00 to $5.50 an acre, so that after paying Mr. Charles E. Swezy, a Land Office attorney, $2500 as commission and for services, Mr. Holbrook's transaction showed a handsome profit to him. Tuman was interested as an equal partner with Holbrook, but was not known as such by the other parties, and did not secure his share of the profits of this and subsequent enterprises from Holbrook until some years afterwards, after suit filed" (R. p. 180).

The Master says:

"It must be perfectly apparent that as regards all these lands acquired by the use of forest reserve scrip, the relationship between Curtis and Collins and the defendant company, their assignee on the one hand, and Holbrook and Tuman on the other, was in no sense that of partners or of principal and agent. It is perfectly clear that Curtis and Collins and the company on the one hand, and Holbrook and Tuman on the other, the latter undisclosed, dealt at arm's-length as adversary parties in any transaction of purchase and sale. This fact is of importance as regards the cases at bar in the light it may throw upon the relations of the parties as regards these timber and stone entries (R. p. 180).

About this time, the spring or early summer of 1902, Holbrook broached to T. D. Collins, his son, E. S. Collins, and to D. G. Curtis, the question of acquiring desired timber lands by

purchasing timber and stone entries. To the elder Collins he stated that scrip was getting hard to obtain, that entries were being made on lands they desired by settlers, but that the settlers' titles were the best titles they could obtain. Collins stated that they would be willing to take those lands if the titles were absolutely good. About the same conversation was had with E. S. Collins and the younger Curtis. E. S. Collins discussed with him various means of acquiring lands otherwise than by scrip, state lieu, school lands and the like, and E. S. Collins assented to the acquiring of the timber and stone entries if everything about the entry was 'fair, above board and legal' " (R. p. 181).

The Master says further:

"The details were not discussed and undoubtedly Collins and Curtis not only desired that the title should be acquired in a legal manner, but had every confidence in Holbrook that they would be so acquired" (R. p. 181).

"The cost of acquiring a timber and stone entry of 160 acres, including a fee of $25, to the locator who furnished the description and pointed out the land, and a profit of $100 to the entryman on the sale, amounted to approximately $592, or $3.70 an acre. This was about $2.00 less than the price of scrip at that time. There was thus the strongest inducement for Holbrook to prefer this class of entries. He had been told prior to that by Mr. Swezy, a Land Office attorney, that it had been decided by some United States Court 'that a person could go into a community broadcast and advertise that he would buy stone and timber claims and could loan money to the entrymen'. Tuman and undoubtedly Holbrook knew at that time that agreements for purchase or sale with the entrymen before entry were illegal, and, furthermore, believed that such agreements

would be illegal at any time before final proof. This was before the Williamson decision and was the universal view of the Land Office and of the public. I have no question that the (R. p. 182) plan of operations devised by Holbrook and Tuman to acquire these lands by timber and stone entries was intended by them to conform to the law. This plan is best disclosed by the evidence of what happened.

The first requisite, of course, would be money with which to acquire the entries. There is no evidence at all that the Curtises or Colinses or the Curtis, Collins & Holbrook Company after its organization, supplied Holbrook and Tuman or either of them or anyone else money to acquire timber and stone entries, as was done by them in the case of the scrip. The money used was that which represented Holbrook's and Tuman's profit on the scrip sales. As Tuman testifies, there was at all times available for this purpose a fund of at least $30,000 in cash. It will be remembered that under the contract of December 19, 1901, Holbrook was paid his profit partly in stock, a small amount in cash, and the balance in the notes of Curtis and Collins. These notes on the 42,000-acre transaction would amount to $26,700, which could have been discounted at once. All this money was handled by Holbrook and kept in his name, partly in the Bank of California and partly in the Bank of Lassen County. Tuman had the right to draw on this latter account and did so (R. p. 183).

While Tuman kept his earlier activities quiet to prevent others entering the land by scripping, he made no effort to do so when the operation of scripping had been accomplished. After that, as he said, 'publicity was what I was after'. It was his design to encourage entries under the Timber and Stone Act and to facilitate them in every way by making known his

> readiness to loan money to entrymen and to create the impression that the lands could be sold after final proof at a profit of not less than $100 to the entryman, avoiding all the time any agreement of purchase. There existed a very well defined rumor that timber and stone entries prior to this could be sold for $750 a claim. Tuman's proposed price was, therefore, an advance. What Tuman did was to stay in the background himself until the time of final proof or after, as did Holbrook, throughout the transaction, and conduct his operations through others commonly termed locators. Apparently the earliest of these locators was one Alexander Cameron (R. p. 184), who is dead. A. E. Head apparently was another in a few cases. A majority of the entries concerned were made with the assistance of John H. Heppe, John E. Remick or John W. Aid. Heppe was the first of these. Heppe had himself made an entry, and after that, at whose initiative does not clearly appear, entered upon the business of locating entrymen" (R. p. 185).
>
> "Undoubtedly Heppe was advised that no agreement should be made. Heppe thereupon became active in encouraging locations."

•

The details in various entries differ, but, generally speaking, Heppe told those whom he approached that they could make $100 over expenses by using their "timber right" and that the expenses, if necessary, would be supplied. Generally nothing more was said. Aid was a laborer or teamster around Chico who brought a number of entrymen from that vicinity. His method was similar to Heppe's (R. p. 185). Remick operated from Taylorville. The operations of Heppe had become well known, as had the possibility of borrowing needed

funds, and the amount of profit on a sale of the land. Remick, seeing the possibility of making some money in the way of location fees, came to Tuman in the spring of 1902 and told him of certain bodies of timber land in Township 25 North, Range 10 East, and in Township 25 North, Range 12 East. Tuman was told by Remick that he had a lot of friends who would like to locate that he understood Heppe had been making a location fee of $25, and that he would like to locate his friends. Tuman examined the land and sent Remick descriptions by mail. In this letter Tuman told Remick that he would loan people money and would send Remick money to be loaned, but to be careful not to make any contracts and to keep account of all moneys expended. He said nothing to Remick about the $100 net profit, but Remick understood that from the operations that were carried on by Heppe. Remick had no conversation with any of the locators to whom he gave descriptions of lands to the effect that their lands could be sold or that they would make at least $100 profit, excepting John Huntington and Edward Cooksey. These were the first two that he had anything to do with and he says, he mentioned the $100 possible profit to them because "it was necessary to start something and I (R. p. 186) explained it to them. Subsequently I did not have to say anything to anyone particularly." As Remick testifies, he asked Cooksey and Huntington if they wanted to take up a piece of land, that they could do so and make $100. "They wanted to know how and I told

them by selling it. They said they did not have any money to take it and I said they could borrow the money. I never told them I would purchase it, but I assured them they could sell it." After that it appears that entrymen came to him and asked for descriptions and he did not find it necessary to do more than furnish the descriptions, all of them apparently relying upon general rumor as to what could be accomplished if the land were sold (R. p. 187).

> "Throughout these operations the expenses of the travelling on the part of the entrymen were paid where it seemed necessary by Heppe or Remick or Aid out of money placed in their hands by Tuman. The final proof money was supplied by Tuman in a majority of the entries here concerned, and was ready at the Land Office on the day of final proof. It was handed to the entrymen sometimes by Remick, in a few cases by his brother or by Arthur Elam, a compass-man in Tuman's employ. In many cases this money was handed to the entrymen secretly in a room apart; in most of the cases probably a note was taken, though not always. Sometimes the note ran in favor of Elam, and very often in favor of S. C. Lewis, whose name was used for the purpose, he being a friend of Holbrook and of Tuman" (R. p. 187).

After final proof, sometimes immediately, sometimes in the course of a few weeks, and at other times even later, the entries were purchased by Tuman.

* * * * * * * *

> "Subsequently, at varying dates deeds were executed by Gregory in favor of the Curtis, Collins & Holbrook Company. Gregory was a real

estate man of San Francisco, a friend of Charles H. Holbrook, Jr. He had been asked by the latter if titles to certain timber lands could be placed in his name as an accommodation, and he assented. He had nothing otherwise to do with the operations and knew nothing about the lands" (R. p. 188).

The Master says:

"In view of the contention of the Government that the conveyance of all of these entries to Gregory and (R. p. 188) the withholding of them from record are evidences of fraud, I pause now to comment on the purpose of this conveyance. A comparison with the scheme of conveyancing as regards the scrip lands at once suggests itself. The use of a third person in whom the titles were assembled was probably suggested by the similar practice of conveyancing employed as regards the lands obtained by the use of forest lieu scrip. The difference between these and the timber and stone lands was that in the scrip lands Curtis and Collins advanced the money to purchase them owing Holbrook after purchase of the base lands the profit due to him under the contract. In the timber and stone entries Holbrook purchased the entries with his own funds. In the scrip lands the trustee was necessary to take the title for the protection of Curtis and Collins in the moneys advanced for the purchase of the base, and for the protection of Holbrook to hold the title to the selected lands until he was paid his profit. He was a trustee for both parties, and when the profit was finally paid the trustee conveyed the lands at the direction of Curtis and Collins to the Curtis, Collins and Holbrook Company. Gregory upon taking title would in no sense be a trustee for Curtis and Collins. He held only for Holbrook (including always Tuman where

Holbrook is thus mentioned). Curtis and Collins knew nothing about him until afterwards. He would only hold for them in the event they paid Holbrook for this land prior to the time they received title. This, however, has not been shown and the natural presumption is that Holbrook was paid for (R. p. 189) these timber and stone lands at the time when Gregory conveyed to the company. At least twenty of such deeds were made in December, 1902, forty-eight in May, 1903, and the balance at various times thereafter.

It was, of course, natural since the lands were passing into one ownership that they should be assembled in one name. The query at once arises, why they were not taken in the name of Holbrook or in that of Tuman, the real owners? Tuman suggests in his testimony that it was to prevent Curtis and Collins from learning what the real profit of Holbrook and Tuman was. This, however, is probably only his supposition and, at any rate, obviously is not a valid reason. Charles H. Holbrook, Jr., states that it was because his father was well known in this country as a dealer in timber lands and that if deeds were taken in his name the entrymen who had not sold would be more likely to raise their price. This, of course, is a possible explanation. The Government, on the contrary, contends that it was part of a general plan evident throughout the transaction whereby Holbrook and Tuman were 'concealing their trail,' and endeavoring to keep the facts from the Land Office. Against this, of course, it may be at once suggested that the putting of these titles in any single name, whether Holbrook's or Gregory's, would convey the same information. This suggestion it is difficult to answer. I am not able to give this fact of the assembling of the lands in Gregory any special significance as regards the question of fraud in these entries (R. p. 190).

The Curtis, Collins & Holbrook Company was formed on August 15, 1902. The first board of directors was composed of T. D. Collins, his son, E. S. Collins; J. G. Curtis, his son, D. G. Curtis; Charles H. Holbrook, Charles H. Holbrook Jr., and Irving F. Moulton. Mr. Moulton, an officer of the Bank of California, was simply an accommodation director to fill the board. The elder Collins was the first President of the company and always remained such. The elder Holbrook was vice-president and general manager. D. G. Curtis was secretary and treasurer. The transfer of lands involved in these suits was actively concluded between D. G. Curtis, representing Curtis and Collins, the purchasers, and Mr. Holbrook in his own behalf and that of Tuman, the latter being undisclosed" (R. p. 192).

The Master states:

> "The money paid for these timber and stone lands I must find was paid by Curtis and Collins and not by the company."

The Curtis, Collins & Holbrook Company carried an account with the Bank of California, beginning September 17, 1902. The authorized signatures at that time were C. H. Holbrook, vice-president, and D. G. Curtis, secretary, both required. A transcript of that account was (R. p. 192) produced *and not introduced by the Government.* The contention of the United States Attorney was that Holbrook was paid by the company. Commenting upon the failure of the Government to introduce this account, the Master uses these words:

> "I must assume, therefore, that the account showed only what other witnesses testified was

> the fact, namely, that except where the company bought direct, its expenditures were only for trifling matters and not involving the purchase of these timber and stone entries."

The account books, stock journal ledger and the minute books of the Curtis, Collins & Holbrook Company, and also the stock certificate book were destroyed, as were also many of the records of the Bank of California in the fire of April, 1906. Mr. Holbrook, Jr., who acted as assistant secretary, keeping the account books of the company and its minutes, stated (and he is uncontradicted)

> "that the purchase of these timber and stone lands by the company was in accordance with resolutions of the board of directors entered on the minutes. These resolutions recited the proposal by T. D. Collins and J. G. Curtis in writing to sell the lands in question to the company in return for stock issued to them at par and the acceptance of these proposals by the company. As in the case of the scrip lands, Curtis and Collins would pay Holbrook direct for the lands through the Bank of California, make their proposition to the company, receive their stock, and the land would thereupon be conveyed by Gregory to the company without passing through Curtis and Collins (R. p. 193).
>
> As part of his payment Holbrook would receive the shares of stock of the company to which he was entitled and which were issued by the company to Curtis and Collins. Each of the sons of the three families concerned having received allotments of stock from their fathers, the two Curtises sold their stock to T. D. Collins, a part in the spring or summer of 1905 and the banalnce in or about February, 1906, at prices ranging from $150 to $200 a share, and

resigned their directorships. Holbrook and his son sold their stock at about the same prices and the same times and likewise retired as officers of the company in February, 1906. C. A. Shurtleff, the company's attorney, then became secretary and has continued as such. Other directors, all representatives of Mr. Collins, at various times constituted the board. Mr. Tuman made a settlement with Holbrook after suit filed in 1905 and got 200 shares of stock, and became a director after the Holbrooks and Curtises sold out. He himself sold his stock to T. D. Collins in March, 1912, for $750 a share.

Charles H. Holbrook, Sr., died on February 22, 1909" (R. p. 194).

After the statement of the facts as substantially stated in the preceding pages, the Master adds:

"From this recital the plan by which Tuman and Holbrook gathered together in Gregory's name a large acreage of timber land is sufficiently evident. It was first to advertise generally the existence of a market for timber and stone entries in Plumas County either by direct suggestion through agents or by the advertisement of neighborhood gossip; second, by the same means to indicate individuals as sources (R. p. 194) of information as to available timber land which otherwise no entryman not a cruiser would be possessed of; third, to lend encouragement to intending entrymen by advertisement in the same two ways that money could be borrowed to facilitate the entry; fourth, to make known again by the same two methods of suggestion by the locating agents and neighborhood gossips, that the profit that could be expected would be not less than $100. Considering what we have learned of the state of the law under the decisions, it is apparent that this plan could be followed without impairing the legality

of the entries by prior agreements as to conveyance. Indeed, it would have been foolishly fatal to have made agreements. Tuman was alive to this possibility. He not only refused to make agreements in several cases where entrymen desired it, but he instructed the men who helped him induce the locations, like Heppe and Remick, likewise to avoid making any promises or agreements. As a matter of law, however, if any agreements were made by any of these men I am of the opinion that it was within the general scope of their powers and that Tuman would be chargeable as their principal (R. p. 195).

I have said it would have been foolish for Tuman to have made agreements. The field was prepared for the operation of his scheme. From 1895 timber and stone entries had been made in this vicinity, and large tracts had been gathered together by T. B. Walker, Engle and others. Most of the entrymen were impecunious and to all of them $100, with the hope that more might be had (R. p. 195), was a considerable inducement; to such persons also the offer of financial aid in purchasing the land from the Government was a welcome and necessary assistance. Such an entryman hearing of what was being done either directly or indirectly might enter a timber claim with the intention of selling it, with the knowledge that it could be sold for not less than $100 and that he would be out nothing of his own funds, if he had them, and yet never come in contact with Tuman or with any of his representatives except in getting a description and being shown the land, and, furthermore, without having in any way curtailed his freedom to dispose of the land as he might choose. Tuman obviously did not loan this money for the purpose of getting any interest upon it or as a matter of philanthropy. His advertisement of a source from which money could be obtained,

which was never, of course, definitely indicated, was to induce the taking of the land. What he did after entry is really not particularly material in view of the Williamson decision. His purpose in loaning the money was to effectuate the entry and incidentally perhaps place the entryman under some sense of moral obligation to him. As he says, his money was fairly secure, since the entryman would have the land and and would either have to sell to him at the profit Tuman offered of $100, or stand suit with the land in the background as security for the recovery of the loan. The chance Tuman was taking when loaning money was therefore not great. At the same time there were several cases where he never got the land nor the money, but doubtless did not think it (R. p. 196) worth while for the amount involved to sue for its recovery. Furthermore, there were a number of cases where the entrymen, realizing that they were practically free to barter, did so, and forced Tuman to come to their terms. All of these facts must be kept constantly in mind in determining whether or not there was an agreement prior to entry. Another thing to be kept in mind is that the issue is to determine not whether what Tuman did was fraudulent, but whether what each entryman did was fraudulent in that he had bound himself by an agreement. If an agreement to sell subsequent to entry is shown expressly or by implication it is immaterial unless it is plain evidence of an agreement prior to entry" (R. p. 197).

The foregoing statement is taken almost verbatim from the Master's Report and is a concise and fair summary of the evidence. We have purposely omitted any detailed recital of the facts showing Curtis and Collins and the Company to be innocent

purchasers, we will set them forth later when discussing that branch of the case.

There were seventy-nine suits instituted by the Government to cancel as many patents on the ground of fraud. The Master found that in fifty-five of them there was no fraud and that in twenty-four the entries in them involved had been made under prior illegal agreements made by the several entrymen, but found that Curtis and Collins and the Curtis, Collins and Holbrook Company had no notice of the fraud and were innocent purchasers, and recommended the dismissal of all of the seventy-nine suits. The Master's Reports, and each of them, were in all respects approved by the District Court (R. p. 400), and decrees entered dismissing the bills (R. p. 406). As stated, in the twenty-four cases appeals were sued out by the Government to the Circuit Court of Appeals and the decrees reversed and the cases are now in this Court on appeal from said decrees of reversal. The cases are substantially similar as to the facts and the questions of law presented.

The Circuit Court of Appeals substantially concurs with the findings of fact and the conclusions drawn therefrom, of the District Court and of the Master, which are in a measure mixed questions of law and fact, except in the following particulars:

I. That T. D. Collins and J. G. Curtis had no knowledge of the fraud of Tuman, Holbrook and the respective entrymen—the Circuit Court of Appeals holding that the facts show that they did.

II. That Holbrook was a *vendor* and not an *agent* for T. D. Collins and J. G. Curtis, and that while Holbrook had actual or constructive notice of the fraud committed by Tuman and was Vice-president of the corporation, it was not under the facts established in the case notice to the corporation—the Circuit Court of Appeals holds that it was, and that Holbrook was an agent and not a vendor.

III. That the Corporation was an innocent purchaser without notice. The Court of Appeals holding that it was not.

Specifications of Errors Relied Upon.

The assignment of errors is found upon pages 1421, *et seq,* of the Record. As is usual in most cases, counsel have phrased the same alleged error in several different ways, but they are in effect as follows, that the Circuit Court of Appeals erred in the following particulars:

(1) In holding that C. H. Holbrook, Sr. was an agent of J. G. Curtis, T. D. Collins, and the Curtis, Collins and Holbrook Company, or either or any of them, in the purchase of the land in suit, and was not a vendor thereof.

(2) In holding that C. H. Holbrook, Sr. had notice, actual or constructive, of any fraud in connection with the entry of the land in question.

(3) In holding that any knowledge, actual or constructive, possessed by said C. H. Holbrook, Sr., of any fraud in connection with said entry, should be imputed to said Curtis and said Collins and said Corporation, or either or any of them.

(4) In failing to hold that if said Holbrook had any such knowledge, it was not imputable to either said Collins or said Curtis or said Company, for the reason that whether agent or vendor the interest of said Holbrook was adverse to the interests of said Curtis and said Collins and said Company, and each of them.

(5) In failing to hold that said Curtis and Collins and said Company were, and each and all of them were, innocent purchasers in good faith and for a valuable consideration and without notice, actual or imputed, of any fraud in connection with the entry of said land.

(6) In holding that there were certain circumstances sufficient to put said Curtis and Collins and said Curtis, Collins and Holbrook Company, or either or any of them, on inquiry as to the facts pertaining to said entry.

(7) In holding that the purchase by Collins of Tuman's stock in the Curtis, Collins and Holbrook Company was a suspicious circumstance.

(8) In directing that a decree be entered in favor of the Government, and in failing, inasmuch as it reversed the case, to order a new trial.

(9) In holding that said T. D. Collins knew of or was interested in, the account or funds represented thereby, in the Bank of California in the name of "Collins and Holbrook".

(10) In holding that the fact that said T. D. Collins aided in the settlement of the suit brought by said Tuman against said Holbrook relative to the division of the profits realized by them from the sale of said land, indicated that said Collins had knowledge of the fraud practised upon the United States in the acquisition of such land.

(11) In holding that T. D. Collins, after consideration paid, conveyance had and patent

issued, and after this suit had been instituted, purchased Tuman's stock in the Company, was a suspicious circumstance.

(12) In failing to hold that the Curtis, Collins and Holbrook Company had fully met the burden of proof, in producing evidence showing that it was a *bona fide* purchaser for value, without notice of fraud in the entry or acquisition of said land.

(13) In considering evidence not properly before the Court.

(14) In considering evidence excluded by the Master, which ruling was approved by the District Court without passing upon the admissibility of such evidence.

(15) In considering excluded evidence which the United States did not make the basis of an exception or specify as an error in said Circuit Court of Appeals.

(16) In reversing the decree of the District Court.

Argument.

In recognition of the rule of this Court that on an appeal from a Circuit Court of Appeals it accepts the concurrent finding of a fact of both the lower courts unless it be clear that their conclusions are erroneous (*Geddes v. Anaconda Copper Min. Co.*, 254 U. S. 590, 65 L. Ed. 425; *Bodkin v. Edward*, 255 U. S. 221, 65 L. Ed. 595), we will for the present confine our discussion of the facts to those in which the Circuit Court of Appeals and the trial Court are in disagreement either as to their existence or the conclusions to be drawn from them.

The Circuit Court of Appeals introduces its criticism of the correctness of the findings and conclusions of the District Court, with a statement touching the acts of Tuman and Holbrook in connection with the acquisition of the lands in controversy. We concede that, as stated in the opinion, "Holbrook was vice-president and general manager of the corporation from the time of its organization in August, 1902, until 1904 when he sold his stock to T. D. Collins", but we can see nothing in that fact disassociated with any other, tending to show notice, either actual or constructive, to T. D. Collins or J. G. Curtis or to the Corporation, of the fraud committed in the entries of the lands involved. It is true, as the Court say, that "Holbrook drew checks and signed them". If by this it is intended to create the inference that Holbrook had exclusive control of the funds of the corporation, to apply and divert them as he pleased, even to the extent of using them for fraudulent purposes should he be so disposed, it is an incorrect statement of the fact, in that all checks were countersigned by D. G. Curtis, then secretary and treasurer of the corporation (R. p. 1020). Moreover, the proof was that D. G. Curtis looked after the active part of the company after it was formed (R. p. 1000). (See, also, findings of the Master, R. p. 192).

The Court say further:

> "Tuman said that Holbrook talked with him, was advised of what was going on and knew

> that he was lending money to applicants for entries. The circumstances show that he did."

Tuman testified that Holbrook "knew of the methods". It is true that Tuman and Holbrook, after a conference, adopted the plan of letting their operations be known so as to induce entries to be made, with the expectation that they could later purchase the land they covered (R. p. 513). To this there was no objection. In *U. S. v. Budd,* 144 U. S. 154 (36 L. Ed. 384) Mr. Justice Brewer, speaking for this Court, says,

> "Montgomery (to whom the property had been conveyed by the entryman) might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the Government."

These methods, however, did not include the making of prior agreements between Tuman and the entryman to buy and sell the land after final proof. Tuman and Holbrook were at that time of the impression that it was unlawful to enter into an agreement of that kind prior to the making of final proof. *U. S. v. Biggs,* 211 U. S. 507 (53 L. Ed. 305) had not then been decided. While it is true that some of the parties who, acting for Tuman, were placing entrymen on the land for a price of twenty-five dollars each, made such an express

agreement in some instances, and by their conduct gave rise to an implied agreement in others, they all with the exception of Cameron, who died before the testimony in the cases was taken, if interrogated touching the point, testified that Tuman did not authorize it. The method of which Tuman testifies that Holbrook had knowledge, did not include any such agreements for Tuman himself did not know of them. Tuman, who did the work in the field, testifies, "I tried to keep him (Holbrook) fully informed of what I was doing" (R. p. 482). Tuman's uncontradicted testimony upon this phase of the matter is,

> "I told them (those aiding him) I would like to see entries made in that district. I think their reply was that they had friends who would be glad to locate on the lands * * * that I wished if their friends made entries on these lands they would do so legally * * * that they should not make an agreement in any form whatever" (R. p. 522).

He testified further that he never instructed any of those aiding him

> "to enter into contracts by the terms of which they would agree to buy the lands of the locators after their locations were made. I had no knowledge at any time that any of these persons * * * were making such representations to entrymen (R. pp. 523, 524). * * * Other persons besides those who actually located the land approached me relative to making locations under the Timber and Stone Act that I refused to assist in making locations. The principal reason for refusing was that they wanted

an agreement beforehand that I would take the land later" (R. p. 528).

Such was the method of which Holbrook had notice and none other. Whether such notice to Holbrook was notice to the company will be considered later. It must be borne in mind that we are at this time dealing exclusively with the alleged fraud and notice thereof to Holbrook. So far as the merits of these respective appeals are concerned, it is the fraud of the entrymen that is controlling. No matter of what fraud Tuman or Holbrook may have been guilty, if the entryman conformed to the law and made his entry in good faith and free from fraud, its validity could not be successfully assailed. In this case, as in the others, the Master found, which was confirmed by the District Court, that the entryman, prior to filing his sworn application, entered into an agreement with one of Tuman's agents, whereby he (the entryman) had agreed with such agent to sell the land entered, to such person as said agent agreed that his principal G. E. Tuman would buy the same (R. pp. 267, 268). The findings proceed upon the theory that the making of such contract was within the implied authority of the agent. There is no finding that Tuman authorized it or had actual notice or knowledge of it. In fact, the record establishes that it was made in violation of his express instructions. The Master, in his report, declares, "It would have been foolishly fatal to have made agreements". Tuman was alive to this possi-

bility. He not only refused to make agreements in several cases where entrymen desired it, but

> "instructed the men who helped him induce the locations, * * * likewise to avoid making any promises or agreements. As a matter of fact, however, if any agreements were made by any of these men I am of the opinion that it was within the general scope of their powers and that Tuman would be chargeable as their principal" (R. p. 195).

It follows, therefore, that Tuman could not have imparted to Holbrook what he did not know himself. Likewise, the loaning by Holbrook and Tuman to the entryman of an amount sufficient to pay the costs of making and perfecting his entry, including the price of the land, did not infringe the law or constitute fraud. The Court from which this appeal is taken, in the case of *U. S. v. Barber Lumber Co.*, 194 Fed. 24, declared:

> "The decision of the present case is ruled by the legal principles announced in the Budd case and in the Clark case. Those decisions are authority for the proposition that a person or corporation desiring to acquire title to a large body of timber lands of the United States under the timber and stone act may express that desire to another, and may enter into an agreement with him to buy the lands upon his obtaining title thereto, may loan him the money with which to acquire title, and may inspect and select the lands, and that such person or corporation is not bound to inquire into the method by which the other party to the contract acquires title, and is not chargeable with knowledge of any fraud upon the land laws that he may resort to, and that in taking titles based upon the issuance of

final receiver's receipts to the entrymen without actual knowledge of such fraud or of facts sufficient to put one upon inquiry, such person or corporation is an innocent purchaser of the lands."

The opinion of the Court of Appeals proceeds:

"Holbrook established a bank account at Susanville, California, and Tuman was authorized to draw against the account. In October, 1902, $1728 was drawn from an account in the name of Collins and Holbrook in a San Francisco bank, and like amount was put to the credit of Holbrook in Susanville a few days afterwards. Later in the same year other withdrawals from the same account in a San Francisco bank were made and substantially equal sums put to Holbrook's credit in the Lassen County bank [the bank in Susanville]. It is but a reasonable inference that this money was used by Tuman to make payments for entries" (R. p. 1398).

That Holbrook had such an account in a Susanville bank and that Tuman was authorized to draw against it, was abundantly established, but it was not proven that the Collins of Collins and Holbrook in whose names the account in the San Francisco bank stood, was either T. D. Collins or E. S. Collins—the two and only two Collinses interested in this litigation—or that either of them knew anything about it. The account referred to was with The Bank of California, of San Francisco, and in the name of "Collins and Holbrook". The sole proof adduced touching this account was that it was opened by Holbrook; that at the time he opened it he left a card with the bank which indicated that he, Holbrook,

could alone check against the funds therein, for the signature was entirely in his handwriting; indeed, the written portion of the card was in the handwriting of Holbrook. It read:

> "S. F. Sep. 15/02.
>
> Authorized signature of Collins and Holbrook in account with the Bank of California, San Francisco, Cal.
>
> 'Collins and Holbrook.' "

As we have seen, the account stood in the name of "Collins and Holbrook". It did not of itself disclose or identify, and there was no testimony tendered or offered to fix or identify, the "Collins" in it mentioned. There was not a particle of proof that it was either T. D. Collins or E. S. Collins; so far as the record discloses, it was *any* Collins, and it would be the purest kind of surmise to say it was either of the last-named gentlemen; there was no evidence of partnership between Holbrook and either of the Collinses, and the account, as the Master correctly held, was not admissible to establish such a relation. It was essential for the Government to first prove a partnership as a foundation for the introduction of the account. Neither can the presumption, "identity of person from identity of name" be appealed to, because the given name of the "Collins" referred to in the account does not appear. There is no proof that T. D. Collins or E. S. Collins were interested in the account in the Bank of Lassen County, to which account it is claimed funds were transferred from the account of "Collins

and Holbrook" in the Bank of California. It must be remembered, it was within the power of the complainant to show whether the "Collins" of "Collins and Holbrook" was T. D. Collins or E. S. Collins, for both of these gentlemen were living at the time these cases were submitted to the Master. T. D. Collins has since died. The Government, by its failure to interrogate either of these last-named gentlemen touching this account, has of its own deliberate election, left the identity of "Collins" to speculation and surmise. As we have said, there is no testimony that Holbrook and T. D. Collins or E. S. Collins were partners. Indeed, the proof is all the other way. In the great mass of testimony brought forward there is, as we say, none to the effect that either of these parties ever declared that they were, or dealt as, partners, or in any manner held themselves out to the world to be such. The simple act of making the deposit did not create an interest in Collins. Holbrook retained the exclusive right to check against the fund, and "Collins" had no such power. The deposits in the account cannot be held to have been a gift, because Holbrook had not in any manner parted with control over the subject-matter and the funds thereof; in fact, he expressly retained it, and he alone could draw against it. Neither was there a trust created, because there were no acts nor declarations upon the part of Holbrook indicating or showing any such intention. Furthermore, a trust could not be held to have arisen, be-

cause of the uncertainty of the identity of the beneficiary, "Collins". Holbrook retained complete and exclusive control over the account and actually took the funds therefrom and deposited them in his account in the Bank of Lassen County, against which he and Tuman checked, and in which there is no testimony that either T. D. Collins or E. S. Collins had an interest. The opening of an account by Holbrook in the name of "Collins and Holbrook" is not the equivalent of a statement on the part of Holbrook that either T. D. Collins or E. S. Collins had an interest in the fund it represented.

Quite a different proposition would have arisen in the event T. D. Collins should have sued Holbrook to establish an interest in the funds in this account, than the one presented here. There, the commencement of the suit would be a voluntary declaration or admission by T. D. Collins that he had an interest in the same, while here, the Government, in attempting to show such interest, force it upon T. D. Collins by the declaration of a stranger, consisting of the opening of an account by him, and in the name of, not T. D. Collins, but of "Collins and Holbrook". But the real purpose of the offered evidence is not alone to establish the fact of interest upon the part of T. D. Collins, but to create a further presumption that by reason of such interest he was a party to the frauds alleged to have been committed by Holbrook and Tuman. If an account, such as the one under discussion, with no evidence

of identification, can be used against a party whose surname alone happens to appear therein, to his injury, it would, indeed, be a very easy matter to create prejudicial presumptions, or place wholly innocent parties in damaging positions. Even if T. D. Collins had sued Holbrook, claiming an interest in the money in the "Collins and Holbrook" account, will it be contended that he (T. D. Collins) could, without any explanatory testimony or preliminary showing that he was the "Collins" mentioned therein, have introduced such account on the trial of his case? That he could not is too clear to admit of debate, and yet that is precisely what the Government endeavored to do in the present instance.

It is respectfully submitted that it was incumbent upon the Government, before the offered accounts were admissible, to prove *prima facie* that either T. D. Collins or E. S. Collins was in some manner, either individually or as a partner, interested in the funds deposited in the name of "Collins and Holbrook", and that one or the other of them was the "Collins" referred to in the name "Collins and Holbrook". This the Government failed to do.

The Circuit Court of Appeals holds that the following, when considered with the other circumstances, is suspicious. A difference arose between Tuman and Holbrook relative to the division of the profits realized by them from the deal with Curtis and Collins, which resulted in Tuman instituting a suit against Holbrook. Subsequently, T. D. Collins

effected a compromise of the litigation, under the terms of which Tuman accepted from Holbrook in settlement 200 shares of the capital stock of the Company and some cash. The Court of Appeals, we think, without the slightest warrant, rejects the explanation of Mr. Collins for this purchase. While that learned Court characterized Mr. Collins' reason for buying this stock as suspicious, it does not state in what respect or what dishonest motives it indicates. The Government's contention has been that it was in the nature of a bribe to induce Tuman to make his testimony favorable to the company. This also is a mere surmise, not justified by the facts. Let us dissect the transaction. T. D. Collins testified that he never talked with Tuman about the cases, what his testimony was going to be, or anything of that kind; that at the time he bought the stock he did not see Tuman, did not talk with him, and had not seen him to talk with him since (R. p. 952).

Upon this point the Master says:

> "The only bit of evidence upon which the Government could hang a suspicion that T. D. Collins suspected fraud in these entries was the fact that since these suits were begun Collins bought 200 shares of the company's stock from George Tuman at $750.00 a share, which, as Collins says, was twice what it was worth. Even this, however, is obviously no evidence that he knew of any irregularities in the entries when they were acquired by the company. It would only show an intent, if it showed anything, to influence Tuman's testimony in this cause. The answer to this suspicion is found in the fact that Collins believed Tuman was going to sell

his stock to a third person with whom Collins, from past experience, desired to have no association, a reason which Mr. Collins at first declined to give and offered only on the direct suggestion of the Master that it was desirable for him to do so. In the second place, Tuman's testimony, if thus intended to be influenced, was not colored with any desire to assist the defendants. He impressed me as truthful and except in certain unimportant details entirely frank and ready" (R. p. 220).

C. A. Shurtleff also testifies as follows:

"Now as regards the purchase of Mr. Tuman's stock by Mr. Collins: I represented Mr. Collins in that transaction. That stock was paid for by notes, I think; those notes were forwarded to me by Mr. Collins and I held them an indefinite length of time because it was at that time that Mr. Tuman was undergoing his reverses and embarrassments. I never in any shape, manner or form, directly or indirectly, ever discussed with Mr. Tuman what his evidence would be in this case or how that transaction would influence his testimony. It was simply closed with him just like any other deal; there was no talk; I never mentioned it to him. I made the deliveries and ended the transaction" (R. 1194-1195). (See R. p. 1199.)

Mr. Tuman himself testifies he had financial reverses in 1911 (R. p. 537). And the stock was purchased at that time he was involved (R. p. 1199).

It further appears in evidence that T. D. Collins, prior to his purchase of the Tuman stock, had acquired the stock of Holbrook and the Curtises, and that the total cost to him of all stock purchased was upwards of $650,000. It is incomprehensible—un-

believable—that, if he knew or even suspicioned, that the titles to some of the lands owned by the Curtis, Collins & Holbrook Company, and constituting nearly one-fifth of its entire assets, were doubtful and open to attack, he would invest so heavily in its capital stock. Likewise, if he was possessed of such knowledge or suspicion and was ready, not only to countenance, but actually procure, false swearing, he would have done everything within his power to hold Holbrook and Tuman in the company so that it would have been to their financial interest to suppress the facts, assuming, which we deny, that either of these gentlemen would have committed perjury to further their own ends. In addition, if the underlying and understood purpose of the Tuman purchase was subornation of perjury, would T. D. Collins, as frankly and freely as he did, admit that in his "estimation" he paid double the value of the stock? If he would procure, he would as readily commit, perjury. In truth, this stock had no market value, and if dishonesty had been in his heart and mind, he could have arbitrarily placed a much higher value than $375.00 per share, which is one-half of $750.00, the price paid Tuman for his stock. In fact, the record in a measure shows it was of greater worth. About five thousand shares of the stock had then been issued. The company owned at least 65,000 acres of land (R. pp. 422-426), which, at $50.00 per acre, the value proven by the Government (R. p. 427), amounts to $3,250,000, giving the stock a

book value of $605.00 per share, and it was probably more.

Again, as the Master in effect declares, Tuman's testimony demonstrates that he was truthful and concealed nothing. Granted, that in some instances he endeavored to construe certain acts as having a certain meaning, he *did not deny the acts;* in other words, there is in his testimony no indication of a suppression of the truth, or a withholding of evidence, and lastly, we have seen that J. A. Root was the agent who approached Mr. Collins and negotiated the sale to him. The Government did not produce Root, nor account for its omission so to do. In the absence of an explanation, the Government's failure in this respect gives rise to the inference that Root's account of that transaction would show that the question as to what Mr. Tuman's testimony would be in these cases was not even considered—in fact, had nothing to do with it—and that T. D. Collins testified truthfully concerning it. This is consonant with a well established rule of law. Moreover, Tuman was a witness for the Government, and while it was drawn from him that T. D. Collins had something to do with the settlement of his suit with Holbrook and that he sold him 200 shares of Curtis, Collins & Holbrook Company stock, he is not asked one word touching what the Government now contends was the real motive for the deal.

That T. D. Collins induced Tuman to settle a suit which Tuman had brought against Holbrook for his

share of the profits in this transaction for less than Tuman should have received under the contract existing between himself and Holbrook, falls far short of even a hint, much less knowledge, of the alleged frauds. Mr. Tuman was asked:

> "How did he (Collins) come to negotiate the settlement?
>
> A. I think he wanted to settle the differences between Mr. Holbrook and myself; he acted in a friendly capacity to both parties. * * *
>
> I told both him (T. D. Collins) and E. S. Collins after the suit was started my side of the trouble, and Mr. T. D. Collins came out on one of his trips to the West * * * some time after the suit was started, I don't know how long, and took the matter up and effected a settlement" (R. pp. 593-594).

This settlement was brought about by Mr. Collins prior to his purchase of the Holbrook and Tuman stock, and the incentive which the Government attributes to him for his actions in the premises necessarily implies that he knew, or had suspicions, of the alleged frauds. Hence, the inquiry is again pertinent, if he had this knowledge, would he have purchased the stock of Holbrook and Tuman, paying the prices he did? His action in adjusting the differences between Tuman and Holbrook (merely a friendly act) and in years afterwards purchasing Tuman's stock, being consistent with uprightness, not out of the ordinary, or even unusual, cannot form the basis for a theory which assumes, for it is not proven, dishonesty, perjury and subornation of perjury, or as revealing knowledge, or even suspicion

of conditions which he, on his oath, declared he was absolutely ignorant (R. pp. 928-929).

In view of the foregoing it seems needless to pursue the discussion further, but there are additional circumstances and suggestions that we desire to call to the attention of the Court. T. D. Collins testified further upon this subject:

> "Q. Do you remember how much you paid Mr. Tuman for his interest?
>
> A. Yes, I remember it to my sorrow, but there is no use of going into the details, there was something behind it. I paid him $150,000 for 200 shares of stock, but it was twice what it was worth in my estimation, but it was simply this, that we had control for ourselves, it didn't make any difference whether that stock was burned up or anything; we owned it; it was done to cover up some other things, it was not for the value of it, it was other things that were to be considered.
>
> Q. Can you tell us what those other things are? (R. p. 943).
>
> A. I don't think it is necessary for me to tell the Court that. This is not the time to tell about that thing. There was the character of a man that was bound up in it, the character of that man has nothing to do in this Court.
>
> The MASTER. The whole transaction, Mr. Collins, is chiefly concerned with Mr. Tuman, and we have heard a good deal about Mr. Tuman and this point which you said you did not care to disclose, it will make no difference in this Court what you say; the way you have left it, I would suggest that you tell the story, because you have spoken in the record something about paying this money to Tuman in a way that was not creditable to him. Now, was it not creditable to somebody else?

A. Not creditable to somebody else. I will tell you it in a few words. There is a man whose name is B. F. Durphy; a man came to me named Root, clear East, and he says B. F. Durphy has that stock, that 200 shares in his control; B. F. Durphy, according to our experience was a rascal of the deepest dye—that ought not to come out in a Court; according to my experience, and my opinion, he was a rascal, but I don't mean to say that outside; that is my opinion and my experience. Now, then, for him to be in the company, I would not have had him there for $150,000, I would not have had him in there for anything, and, as a consequence, I paid the bill and got it, that is the whole story. That don't effect Tuman at all (R. p. 954).

Mr. PIER (attorney for the Government). Q. Did you ever inquire of Tuman if Durphy had control of the stock?

A. No, I did not in any way inquire of Tuman, but somewhere he had his hand on it in some way like a vise, and I didn't want him inside; I thought he would make trouble for us outside and inside, and I paid the money, and the money I paid I would not have had him in there for all that money.

I did my business in that connection with an agent sent to me by the name of J. A. Root. I never made any inquiries of Tuman, at all, about the transaction. I never went to see him to ask him about it. I will say this much, that I had to do it quick. I had no time to ask around. It was presented to me and I had to do it quick or not; some of these things have to be done quick" (R. p. 945).

This is another instance where the Government's failure to present Root to deny the representations made to him, Collins, touching Durphy having the 200 shares in his control, is not explained—again

the presumption arises that Root would not refute Mr. Collins.

It is significant, that at no time has the Government pointed out, nor can it now point out, in what respect Tuman's testimony is shown to be false, or what was concealed or suppressed by him. If it should be said it was touching knowledge of the alleged fraud by T. D. Collins or any of the other interested parties, aside from Holbrook, we reply again, this is the purest surmise and suspicion, for all the evidence unmistakably points to the truth of T. D. Collins' and his associates' sworn declarations that they had no such knowledge (R. pp. 928-929). As said by Mr. Justice Holmes in *U. S. v. Clark,* 200 U. S. 601 (50 L. Ed. 613), "When suspicion is suggested it is easily entertained", and by Mr. Justice Brewer in *U. S. v. Budd,* 144 U. S. 154, "No man is presumed to do wrong".

The Court of Appeals say further:

> "It is in evidence too that in 1904 and 1906 officials were actively investigating entries of lands not involved in this case but in the same vicinity and which it was alleged by the officials had been sold to the Curtis, Collins and Holbrook Company. Tuman discussed the matter with Holbrook and testified that Holbrook was opposed to defending the entries. He also talked over the matter with E. S. Collins and T. D. Collins. T. D. Collins admitted that he had talked about these lands, but they were lost and that was all there was to it" (R. p. 1398, 1399).

None of these cancelled entries are involved in this or any of the companion cases on appeal, nor were they involved in any of the seventy-nine cases, of which those we are now considering are part.

Tuman testified that the first conversation he had with Holbrook touching these cancelled entries occurred either during the latter part of 1906 or the early part of 1907, and that Holbrook was not then connected with the company (R. p. 569); that he (Tuman) also had a conversation with Shurtleff (the secretary of and attorney for the company) about the same time, but subsequent to his talk with Holbrook (R. p. 570), and had discussed them with E. S. Collins in 1908 (R. p. 570) and that he mentioned it to T. D. Collins about 1909 or as late as 1910 before these suits were brought (R. p. 570); that he had never discussed them with D. G. Curtis, or J. G. Curtis, or Irving F. Moulton, who was then a director of the company.

It appeared from the files produced that the proceedings for cancellation were commenced *subsequent* to the purchase by Curtis and Collins of the lands involved here, and there was a total absence of proof that the proceedings for cancellation had been brought to the notice of the corporation or any one representing it, or to Curtis and Collins, or to any one representing them, *before the title to the lands, which are the subject of these actions, had been purchased, paid for and actually transferred to the company.* There was no proof that Tuman was then a director. Several of these files

also contained notices sent to Holbrook, who was not then, as above stated, in any manner connected with the company, which notices had been by him returned to the department. The files further disclosed that the Government was cognizant of the fact that in a number of cases the entrymen had conveyed to Gregory, but there was no proof of notice to Gregory; neither was there proof of notice to all of the entrymen whose lands were involved in the proceedings for cancellation. With the record in this state, the Government offered in each instance, not the entire file, but certified copies of the letter showing that the entry had been canceled, the purpose being to show the grounds of such cancellation, the attorney for the Government adding that if the certified copies of the letters of cancellation were, not considered sufficient by the defendants, then the Government offered so much of the record as is necessary to establish whatever appears from the original papers (R. p. 570). This offer, as has been stated, was objected to by the defendant corporation; the objection is lengthy, but in substance is that the documents offered were immaterial, irrelevant and incompetent; that there was no proof that the defendant corporation heard of the facts alleged in the different cancellations or knew of them, *prior* to the acquisition of the lands covered by such cancellations, or those here involved; that none of the orders of cancellation were *res adjudicata* as against the defendant corporation, because notice was not shown to have been given it; that the proofs in the

present case showed that the Government had issued patents covering a large amount of the lands involved in the litigation after it became aware of the alleged facts upon which such cancellations were based; that the cancellations did not in any manner create an estoppel; that they did not tend to establish any admissions upon the part of the corporation defendant; that the cancellations proved nothing, either against the entrymen defendants or the Curtis, Collins & Holbrook Company in the consolidated cases. The other details of the objection are fully set forth in the Record at the point above referred to (R. p. 570 et seq.).

The objection was sustained, the Master's reasons therefor appearing upon pages 579 et seq. of the Record, and approved by the District Court (R. p. 403). Moreover, this ruling is not assigned as error ~~either~~ in the assignment of errors.

Assuming for discussion purposes only that the Curtis, Collins and Holbrook Company had knowledge, gained *after* an investigation, that these canceled entries were fraudulent, and, being so advised, it decided not to appear in the proceedings or in any manner contest them, such conduct would not be proof, nor even give rise to the presumption, that like conditions prevailed in the entries involved in these actions, *nor that it had knowledge thereof.* (*United States v. Budd*, 144 U. S. 155-164.)

It should be remembered, that the company was not in a position to claim that it was an innocent purchaser of the lands involved in these cancelled

entries, for patents had not then, in fact, never have, issued. All the company then had was the equitable title which, the authorities hold, is not sufficient to sustain the claim of *bona fide* purchaser without notice.

The opinion of the Court of Appeals contains the statement that

> "although both Curtis and Collins lived in Pennsylvania, they, together with Holbrook and Tuman looked at the lands and timber in 1902 after the contract was made. D. G. Curtis, Jr., who was treasurer of the Company, also frequently went upon the lands (R. p. 1398).

How, or in what manner, or to what extent do these visits indicate fraud or knowledge of fraud in connection with the lands here involved? It was the natural and prudent thing for the parties to go upon the lands. If any stress is to be given to the fact that the inspection by Curtis and Collins was after the script contract of December, 1901, it is negatived by the fact that T. D. Collins testified that he had a general idea of the character of the lands prior to the time he and J. G. Curtis entered into said scrip contract with Holbrook (R. pp. 945-946). It should be remembered that the lands then examined by Curtis and Collins were those acquired through the application of scrip (R. p. 946), and such examination had no connection whatever with, and did not include, the lands from the Government having their source of title in the Timber and Stone Act, and which are the lands involved here.

The Circuit Court of Appeals declares that notice, actual or constructive, to Holbrook, was notice to the corporation, and that the contract entered into at Warren between T. D. Collins and J. G. Curtis on the one hand and Holbrook on the other, was one of agency and not of sale as held by the Master and approved by the District Court. The Court say:

> "In its real aspect the case is brought within the familiar rule that notice to or knowledge of an agent while acting within the scope of his authority and in a matter over which his authority extends, is notice to or knowledge of the principal, Mechem on Agency, Sec. 1803" (R. p. 1401).

and that appellants were not, as found by the trial Court, *bona fide* purchasers.

These questions, as well as those remaining, are so interwoven in their facts and the law, that we will consider them together. The Court of Appeals declare:

> "The corporation took deeds from Gregory but paid him no consideration whatever for the land. The purchase was not made from Holbrook and from Curtis and Collins individually because neither Holbrook nor Curtis nor Collins had the title to the land and none of them were in possession thereof" (R. p. 1400).

The Court does not indicate the bearing this statement has upon the case, or make application of it. As a matter of law, it is well established that a valid contract of sale may be made with one *not* having the title.

> "A contract whereby the vendor binds himself to convey realty to which he has no title at

the time he enters into the contract is valid, and the subject matter thereof is lawful. As in contracts for the sale of mere possibilities, failure by the vendor to acquire an interest in the property of the kind specified by the contract in time to convey it in compliance with the terms of the contract will constitute a case of breach, but will not affect the original validity of the contract."

39 *Cyc.* 1213, par. 5, and cases cited.

The only theory upon which the position of the Court of Appeals can be supported is that Holbrook acted as agent for Curtis and Collins and was not a vendor, and that his interest as such agent was not adverse. A question we will now consider.

HOLBROOK'S POSITION IN THE TRANSACTION.

Between principal and agent and vendor and purchaser there is a well established distinction.

"An agent is defined to be one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do."

2 C. J. 420.

"The term 'agent' is one of very wide application, and includes a great many classes of persons to which distinctive appellations are given—as factors, brokers, attorneys, cashiers

> of banks, clerks, consignees, etc. Indeed, any one who undertakes to transact some business or to manage some affair for another, by authority and on account of the latter, and to render an account of it, is denominated an agent. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal might or could do."
>
> *1 Amer. & Eng. Encyc. of Law,* 2nd Ed. 938.

See

Mechem on Agency (2nd Ed. Vol. 1 Sec. 26).

To the same effect is *Story on Agency,* Ninth Edition, Section 3.

> "The relation of vendor and purchaser is that which exists between the parties to a contract whereby one party, known as the vendor, agrees to transfer to the other, known as the purchaser or vendee, some interest in real property for a valuable consideration, and not by way of security."
>
> 39 *Cyc.* 1174.

Reference to the essential portions of the contract under which the parties acted, will show that Holbrook was in no sense the agent of Curtis and Collins. The agreement dated December 19, 1901, is the agreement under which the parties purchased the scrip, and with only minor changes the one under which they continued to act in the purchase of the lands involved in this action. The contract provides:

That Holbrook "agrees to sell to and have the title thereto vested in" Curtis and Collins, 42,380 acres of timber lands in Tehama and Plumas Coun-

ties at a cost of $7.50 per acre, totaling $315,600.00, less certain interest, which sum and price Curtis and Collins "hereby agree to pay for said lands as and in the manner and at the times in this agreement provided" (R. p. 1275).

Holbrook agrees to secure forest reserve from parties owning the same, and apply it to the acreage mentioned; that the forest reserve shall be transferred to Thompson as Trustee, to be held by him in trust for the purposes of the agreement (R. p. 1276).

Curtis and Collins agree to deposit on or before the 31st day of December, 1901, $200,000.00 in the Bank of California to be applied by the bank in payment for all forest reserve not to exceed the aforementioned acreage (R. p. 1276).

Then follows a provision for the examination of the title by the attorney for Curtis and Collins, and the direction for payment by the Bank of California (R. p. 1277).

That when the $200,000.00 is exhausted, Curtis and Collins agree to deposit the balance necessary to pay for the stipulated acreage, said balance to be expended in the same manner as the $200,000.00 (R. p. 1277).

That the bank shall accept the certificate of title of the attorney, and that any payment made thereunder shall be conclusive as to title upon the parties (R. p. 1278).

That the trustee shall deed to the United States said lands deeded to him, and make proper appli-

cation for specific tracts mentioned in the schedule (R. p. 1278).

That when the trustee shall have received notice from Holbrook that he has been fully paid, said trustee shall, before or after United States patent deed said lieu lands to Curtis and Collins (R. p. 1278).

That all papers in connection with applications should be prepared by an attorney (R. p. 1279).

When the full acreage is secured by Holbrook through the application of forest reserve, and the same deeded to the trustee, or when Holbrook has *otherwise secured title thereto,* a corporation is to be formed under the laws of the State of California, the corporation to have a capital stock of $500,000.00, the shares to be of the par value of $100.00 each (R. pp. 1279 and 1280).

That upon the completion of the organization, Curtis and Collins shall convey or cause to be conveyed, the acreage mentioned, and receive in payment 3156 shares of stock, leaving 1844 shares in the treasury (R. p. 1280).

That Holbrook shall be one of the original incorporators, and serve as a director as long as he holds stock (R. p. 1280).

That when the said acreage has been deeded to the trustee or secured to Curtis and Collins by acquiring forest reserve, *"or through any other method or source"*, Curtis and Collins shall pay to Holbrook the balance due, as follows: They shall issue 789 shares of stock of the corporation to be or-

ganized, fully paid, to Holbrook, and pay him from $5,000.00 to $10,000.00 cash, and the balance of said $115,600.00 in notes bearing interest at the rate of 6% in full payment of said balance, when Holbrook shall give notice to the trustee of the payment of said balance, in order that the trustee may convey (R. p. 1280).

It is expressly understood that the trustee shall not convey to Curtis and Collins any part of said lands until Holbrook in writing notify him that he has been fully paid said balance (R. p. 1281).

That in the event Curtis and Collins advanced any amount in excess of $200,000.00, then and in that event the principal of said promissory note shall be reduced accordingly (R. p. 1282).

It is further agreed that in the event that Holbrook is unable to secure the full acreage in said counties through the use and application of forest reserve, *"he may secure such title through any other legal means or source"*, provided that he or the persons deeding the same shall not be paid until the title is certified to be good by Charles A. Shurtleff and deeded to the trustee, and that when so deeded and certified the bank shall pay therefor out of said deposit, and that such payment shall apply to the purchase of *"the lands the title to which is secured other than by the application or use of forest reserve"* (R. p. 1282).

That in the event the purchase of said acreage shall not exhaust said $200,000.00, then the balance of said fund shall belong to Holbrook (R. p. 1283).

This contract, it is true, covered the acquisition of forest reserve, but it is plain from the evidence, and we think it must be conceded, that the agreement concerning the purchase of the timber and stone entries was substantially an extension of the initial contract, and that none of its terms were changed in any essential detail. About the only modification being that Thompson, as trustee, was eliminated.

In fact, we have italicized in the foregoing resume of the contract the portions which show that even at the time of entering into the contract it was contemplated and agreed that the title might be procured from sources other than by the acquisition of forest reserve.

It is also apparent from a reading of said contract or the foregoing resume of the same, in the light of the facts and of the quoted definitions of principal and agent and vendor and purchaser, that said contract bears no earmarks whatsoever of the former, but can be no other than one of vendor and purchaser.

It will be noticed, and we earnestly call the Court's attention to the fact, that in an agency the agent acts under the authority of the principal and for and on his behalf and therefore necessarily is able to bind him by way of contract. There is not a word in this contract, or in the record, showing that Holbrook had any authority whatsoever to bind or that he attempted to bind Curtis and Collins. Upon the contrary it shows, as we have said, that

Holbrook was the seller and Curtis and Collins the purchasers, and that Curtis and Collins threw every safeguard around the purchase. They expressly provided the steps which must be taken by the seller in order that their interests would be safe, and in order that the fund deposited by them in the Bank of California should absolutely be applied to the purchase.

We repeat, that it is very evident that the parties to the contract were dealing at arm's length; each seeking to safeguard his interest against the other and nothing being left to or in reliance upon the good faith of the opposite party. The holding of the Court that Holbrook was the agent of Curtis and Collins, is to declare that when one man crosses the continent for the purpose of securing another who is an entire stranger to become interested in the purchase of certain lands which the former is to acquire through the application of forest reserve or other scrip, which is entirely and in every respect legal and proper, and finally interests such stranger to make the purchase, and they deal with each other at arm's length—are careful to go into detail touching the purchase, the price to be paid, the method of examining titles, the payment of the money through a bank, the taking of title in a trustee's name, having the title examined, not making payments until the title has been accepted by an attorney and the owner of the scrip has conveyed the same to a trustee—that such a transaction constitutes an agency instead of an agreement of sale

and purchase; that it creates a relation of agency in spite of the positive stipulations to the contrary found in the agreement; that under it he could bind the purchaser as his agent; that notwithstanding all the painstaking care of the purchaser to frame the agreement so as to state the reality of the transaction so that the seller could not go out into the world and bind him by contracts for the purchase of lands, it must be swept aside and stamped as an agency. Take the agreement by the four corners and it is impossible to reach any other conclusion than that it was one of sale and purchase; likewise, take the acts of the parties touching these lands after the execution of the agreement, and they also support such claim absolutely and without question. We respectfully submit, that there was not present in the transaction anything in the nature of principal and agent.

The agreement covering and providing for the purchase of timber and stone entries, which as already stated, was nothing more nor less than the extension of the former agreement with a few modifications, was also one of sale and purchase. It is inconceivable that a principal would employ an agent to purchase land and give him as large a profit as there was in this transaction, amounting in its entirety to nearly, if not more than, two hundred thousand dollars when the ordinary commission would be less than $20,000.

If there was anything in this record which knitted fraud to Mr. Collins and Mr. Curtis, both of whom

had long passed the meridian of life when this transaction took place—or showing that after a long and honorable career they were parties to an attempt to cheat the Government, then we would without protest bow to the decision of the Court of Appeals. But it does seem hard, in the face of a long life well spent, upon the frailest kind of testimony—a pyramid of presumptions—to vest the penalties of fraud upon them, not actual, or even constructive, but fraud, which it is said they might have discovered had they instituted an inquiry whereas there was not a single thing brought to their attention which would cause them to initiate such an inquiry or of which they had constructive notice. The opinion of the Court of Appeals fails to cite even one act of overt fraud upon the part of either Curtis or Collins and it could not do so. At best it merely says, and with all due respect to the Court we can find no foundation for the declaration, that they were placed upon inquiry, and then applies to their detriment the presumption that they should have made such investigation, notwithstanding, as we hereinafter point out, they would have found nothing wrong, and by reason of such failure deprives them of their property. In other words our protest is that land titles having their initiative in a United States patent—a solemn instrument—should not be set aside and vacated upon mere surmise and speculation or upon failure to make certain inquiries, which if made would have been fruitless and disclosed nothing fraudulent.

DEFENSE OF BONA FIDE PURCHASER.

We agree that the defense of *bona fide* purchaser is an affirmative one and must be pleaded and proven, and submit that in addition to the denials in the answer it is pleaded in each case as a separate answer and defense, that the company was an innocent purchaser for value and without notice (R. pp. 27 and 28). The Court of Appeals does not question the sufficiency of these allegations but hold they were not proven.

It is submitted that the company met fully and completely the rule that the burden was upon it to establish that it was an innocent purchaser—the Master so found (R. pp. 208, 209). Indeed, a large part of the evidence introduced by the company was directed to the point of notice and knowledge, and here let us say that we at all times treat Curtis and Collins, who owned more than four-fifths of its stock, and the Curtis, Collins and Holbrook Company as identical—we make no other claim. Whatever responsibilities and odium attached to Curtis and Collins or either of them in these transactions, attach with like effect to the company. The corporation was not organized with the object of covering or concealing a single act or thing, and there is no proof of its ever having been used for that purpose.

The fact that the Government in proving its case may have offered and introduced some evidence which it claimed bore upon the issue of knowledge or notice, does not even tend to show that the com-

pany did not fully meet the burden resting upon it. In the orderly conduct of the trial the company could offer no evidence in support of its affirmative defense of *bona fide* purchaser, until after the Government rested. In other words, when the Government sufficiently proved its allegations of fraud, to make what it conceived to be its *prima facie* case, the burden shifted to the company to sustain its affirmative defense of *bona fide purchaser,* and the finding of the Master is that it met that requirement.

As demonstrating how completely the company met this issue, we quote the following from the Master's Report. He says:

> "It is entirely clear that neither the corporation nor any of its officers, if we except Holbrook and Tuman, had any knowledge actual or constructive of the frauds alleged (R. p. 209). * * * So far as Tuman is concerned, he did not become a Director until 1906, long after the title to these lands passed to the company (R. p. 209). * * * The facts of the cases at bar are on all fours with the cases just quoted from (U. S. v. Detroit Timber & Lumber Co. and U. S. v. Clark). The Government has claimed that Curtis and Collins were principals and that Holbrook was their agent to acquire these lands. The claim utterly breaks down under the evidence. Curtis and Collins on the one hand and Holbrook on the other are plainly seen to have been dealing at arm's length in an adversary relation as vendee and vendor, respectively. The case is not as strong as the Clark case. Curtis and Collins made no loans of money to acquire these timber and stone lands as did Clark. The money was Holbrook's own, the profit of his previous dealings with

the scrip lands. They did not have any cruiser or other representative on the ground who might be cognizant of details, as in the Clark case. Curtis and Collins made one or two trips generally throughout the timber country, but knowing the country in general, and relying from past dealings on Holbrook's word, they accepted his estimates of the amount of timber without question. All the directors and officers of the Curtis, Collins & Holbrook Company since the beginning, with the exception of Holbrook, and he is dead, have appeared as witnesses in these cases and denied any knowledge or any suspicion of irregularity in the entries (R. p. 217). They all appeared to be men of honor and business integrity. J. G. Curtis and T. D. Collins are men over 70 years of age. Curtis knew nothing of the details of these timber entries, no longer owns any stock and is therefore without interest in the controversy, nor is it even contended by the government that his testimony is not true. T. D. Collins, who owns all the stock of the corporation except a minor portion belonging to his son, and the necessary qualification shares for directors, is a man of strong religious principles and testified, in advance of the regular order in which he would have been called because it then appeared that illness might end his life before the defense would be reached. Under these circumstances his testimony of innocence gains additional credence. D. G. Curtis, as Secretary, checked over the acreage with Holbrook on the passing of the deeds but made no investigation of the manner in which title had been acquired. Both T. D. Collins and E. S. Collins testified that when Holbrook stated that scrip was hard to obtain and that to acquire more land it would have to be obtained from settlers, that their rights were the best rights obtainable they assented on condition that the title should be

'first class.' Their relations with Holbrook had been so satisfactory as regards their dealings on scrip lands that they had every reason to trust him implicitly. Holbrook assured them, even guaranteed them, that the titles were perfectly regular and valid. Under these circumstances, in accordance with the cases above quoted from, the purchasers had no reason to look further for grounds of doubt. Mr. C. A. Shurtleff, who was attorney for both parties during the transactions, and Secretary beginning in 1904, is a lawyer of the best standing at this bar. All of these parties, including all officers of the company as stated from the beginning testified that they knew of no charges of fraud until after or about the time of the filing of these suits in 1910.

"No examination of the title to the entries was made until 1905 when Collins bought out the Curtis and the Holbrook stock. At that time Mr. Shurtleff as his attorney examined the paper record of the cases and naturally found everything regular. This record consists of the Register's receipts, the deeds to Gregory, and the deeds from Gregory. Mr. Shurtleff did not have the Land Office records. If he had examined them then or at any previous time they obviously would have disclosed no irregularity. They would have passed his inspection just as they passed the inspection of the Land Office officials.

"E. S. Collins, at the time Holbrook proposed taking over timber and stone entries, was somewhat familiar, through a residence in the State of Washington, with the fact that frequent irregularities in such entries took place but obtained Holbrook's assurance that everything in regard to the entry was 'straight and proper' and was satisfied with that. No details were discussed.

"The evidence of such men cannot be lightly disregarded. But let us go farther than the cases warrant and assume an obligation upon those in charge of this matter to examine further. If they had been able to hunt out and find the original entrymen, it is not likely that the entrymen would have testified differently from their testimony in the Land Office if they had been willing to talk at all. In a table annexed to this report to be subsequently referred to, I will set forth in the form of a schedule the dates of final proof and the dates of the deeds of the entrymen which would show (R. p. 219) the nearness of these transactions to each other and to the dates of the respective final proofs. But this in the opinion of the Supreme Court would not impute notice (R. p. 220). * * *

"It thus conclusively appears that except from conclusions that may follow from the facts that Holbrook was at the time that these titles were acquired vice-president and manager of the Curtis, Collins & Holbrook Company, neither J. G. Curtis (R. p. 220) nor T. D. Collins nor the company itself nor any of its officers at any time had any actual knowledge or notice or any constructive notice arising from the facts that would put them on inquiry as to the fraud which the Government claims constitutes its equity" (R. p. 221).

In *U. S. v. Clark,* 125 Fed. 774-776, which is in point, it is said:

"But let it be considered that the defendant, Clark, was bound to take notice of the different steps taken by the entrymen in obtaining these patents. What would he be required to take notice of? The records of the Land Office appear to have been in due form and correct. They were such as induced the Land Department to issue the proper patents

> to the entrymen and entrywomen. I do not think he could be required to be more astute than the land officers themselves."

As to the claim that the company took its title from one Gregory but paid him no consideration therefor, we submit we do not claim, and never have claimed, that Curtis and Collins, or either of them, or the Corporation, paid one cent to Gregory, or to any of the entrymen, and if payment to them or either of them, is essential to establish the company's defense of *bona fide* purchaser, then it fails. We contend, however, that it is not one of the requisites of such defense. The finding of the Master and the proofs are to the effect that the lands were purchased by Curtis and Collins from Holbrook; that they paid him in cash and stock of the Corporation for them, and that they were assembled in Gregory's name, who was the trustee for Holbrook. The Court of Appeals declare:

> "Speaking generally of all the cases like Cooksey's, clearly Gregory (this case) as a grantee was a trustee for Holbrook and Tuman" (R. p. 1397).

Gregory did not own them; indeed he disclaimed any interest in them whatever. He paid nothing for them; neither did he receive any consideration when he conveyed. He says:

> "I had no interest whatever in this timber land" (R. p. 1171).
>
> "I never paid a cent of money out for any of this land" (R. p. 1172).

> "During all the time this land was in my name I was holding it confidentially for whomsoever Mr. Holbrook, Jr. (son of Charles H. Holbrook) was representing, either for him personally or for whoever his principal might be" (R. p. 1173).

He was a mere passive trustee—a trustee holding the record title for the accommodation of Holbrook. As the Master says:

> "Gregory upon taking title would in no sense be a trustee for Curtis and Collins. He held only for Holbrook (including always Tuman where Holbrook is thus mentioned). Curtis and Collins knew nothing about him until afterwards" (R. p. 189).

To say that the consideration should first have been physically handed to Gregory, to be by him delivered to Holbrook, whom the Master found was the actual vendor, is, to put it moderately, a technicality. One of the maxims of equity is that "Equity looks at the intent rather than the form", kindred to which is the further and equivalent canon of that jurisdiction that "equity regards the substance and not the form."

The Government claims, that granting the land was purchased from Holbrook and from Curtis and Collins individually, to whom a consideration was given, still the defense of *bona fide* purchaser is not established, because neither Holbrook nor Curtis and Collins had the title, nor were they in possession, asserting that to be a *bona fide* purchaser, the pur-

chase must be by deed from one having the fee simple title.

It is submitted that this position is also untenable. If it is based upon the fact that the title originally stood in the name of Gregory, and passed from him to the company, then what has just been said touching Gregory's relation to the land and to Holbrook is applicable here. Gregory *was* Holbrook, there is no escape from that conclusion. Upon the other hand, if the contention is based upon the claim that at the time the entryman deeded to Gregory and Gregory to the company, the legal title was in the United States because patent had not then issued, and neither the entryman nor Gregory, prior to patent, had anything more than the equitable title, then such claim is likewise groundless. All of these suits were brought after patents issued; indeed, it is their object to cancel such patents, so that at the time the bills were filed both the equitable and legal title had united in the Curtis, Collins and Holbrook Company, which was ample to enable it to take advantage of the defense of *bona fide* purchaser.

But the right of the company to make and establish this plea is grounded upon the fact that it holds both the legal and equitable title, for which it paid a valuable consideration, and that it never heard of the charges of fraud until after patents were issued. Let us refer to a few of the authorities:

Lewis v. Shaw, 70 Fed. 289 (Circuit Court D. Washington,) held:

> "The rights of a bona fide purchaser from one who has entered timber lands under the act of congress of June 3, 1878, which provides that, for a false statement by the entryman, any grant which he may have made shall be void, except in the hands of a bona fide purchaser, are not affected by a subsequent cancellation of the entry for false representations, although at the time of his purchase no patent for the land had been issued" (head note).

In *United States v. Gridley,* 186 Fed. 544, 547 (Circuit Court D. Idaho, C. D.), Judge Dietrich, after citing *U. S. v. Detroit Lumber Co.,* 200 U. S. 321, uses the following language:

> "By the latter decision, it is established that, where the government has by patent conveyed the legal title, it cannot successfully maintain a suit against a purchaser from its grantee to cancel the patent for the fraud of the entryman, where the defendant is at the time the suit is brought, vested with the legal title, even though it purchased from the entryman before patent, but after final proof; provided, of course, the purchase was in good faith and a valuable consideration was paid without knowledge of the fraud."

In *Boone v. Chiles,* 10 Peters 117 (9 L. Ed. 388), a case relied on by appellant, Mr. Justice Baldwin, speaking for the Court, said:

> "This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity, a court of equity can act only on the conscience of a party; if he has done nothing that taints it,

> no demand can attach upon it, so as to give any jurisdiction (Sugden on Vend. 722). Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30-34) which court of equity imparts liberally. *Such suitors are its most especial favorites"* (Italics ours).

As illustrating the extent to which the Courts have gone to protect innocent purchasers, or parties who have purchased in good faith, see *Colorado Coal & Iron Company v. United States,* 123 U. S. 307 (31 L. Ed. 182); *U. S. v. Detroit Timber and Lumber Co.,* 131 Fed. 668 (Opinion by Sanborn, Circuit Judge, (affirmed) 200 U. S. 321 (50 L. Ed. 499).

United States v. Detroit Timber & Lumber Co., 131 Fed. 668, is a case where the doctrine of *bona fide* purchaser is discussed and applied. Sanborn, Circuit Judge, speaks for the Court, and so much of the opinion is in point that we quote from it at length. The learned Judge says:

> "The moment the legal estate inured to the benefit of the Detroit Company by the issue of the patents without notice of any fraud or irregularity in their procurement its defense of a bona fide purchase was complete. It contained every essential element of a complete defense except the legal title before the patents were delivered. It was the lack of the legal title, and that alone, that made its defense vul-

nerable in the Land Office. When the patents had issued, the power of the Land Department had ceased, and the Detroit Company's position was conditioned by every attribute of that of a bona fide purchaser. Conceding that the indispensable elements of such a defense are absence of notice of the fraud or defect, good faith, payment of value, and the legal estate, it is not material at what time or in what order the purchaser acquires them. It is only necessary that they all concur in him at the same time. It is indispensable to this defense that the consideration should be paid before notice of the defect. But it is not essential that it should be paid before or at the time the title is conveyed. It is sufficient if the payment is completed at any time before notice of the defect is received. It is not more essential that the legal title should be secured before or at the time when the consideration is paid. It is enough if it is acquired before notice of the alleged fraud or perjury is fastened upon the purchaser. * * * The purchase price had been paid in full. The legal title had been acquired. No notice of any fraud or perjury in the inception of, or of any defect in, the title which it had bought, and which had passed from the complainant to it when the patents were issued (Sandels & H. Digest, Sec. 699), had been received. Why was not its defense that it was a bona fide purchaser impregnable? No satisfactory answer to this question has occurred to us, and our conclusion is that one who purchases in good faith and pays value for the equitable title to land of the government evidenced by the receiver's final receipt, and who subsequently, and before receiving notice of any fraud or defect in his title, acquires the legal estate through the issue of the patent, is a bona fide purchaser, and his title is unassailable at the suit of the United States

to avoid the patent for fraud or perjury of the immediate or remote grantors of the purchaser. (Citing cases.)

"Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances. Bona fide purchasers are the especial favorites of courts of equity. * * *

"Conceding now, for the purpose of the remainder of this discussion, that the Detroit Company purchased and paid for the equitable estate evidenced by the final receipts in the first instance, and that it did not acquire the legal title until the patent issued, what has that company done to taint the conscience of any one, or to entitle the government to any relief against it in this suit? The record discloses nothing. The general rule in chancery is that, where equities are equal, the defendant prevails; that it is only when the case of the complainant appeals to the conscience of the court with the greater force that it will interfere to grant relief (citing cases). Here the equity of the government is far less persuasive than that of the Detroit Company. The former has received and still retains $17,000, the purchase price which it fixed for these lands; and it asks this court that the timber upon them, which constitutes their only real value, be taken from the defendant, which has innocently bought and paid for it, and restored to the complainant. It issued its final receipts, which were prima facie evidence of a right in the grantees therein named to the title to these lands, and the Detroit Company purchased and paid for the timber upon them in reliance upon these certificates, without notice of any fraud in their procurement. The company seeks no relief, but prays only that it be permitted to

retain that which it bought and paid for in good faith, while the complainant seeks to keep the purchase price of the property which it sold and to recover back the property itself. The equity of the defendant is the stronger. Not only this, but the Detroit Company has added to its equitable title the legal estate in the timber. Where equities are equal, the law must prevail. A court of equity will not interfere at the suit of the holder of a prior equitable title or claim to deprive the innocent purchaser for value of a junior equitable estate of equal strength of a legal title which he has subsequently bought or obtained after notice of the defect. It will not disarm a bona fide purchaser, or take from him the shield of any legal advantage (citing cases). * * * The case at bar falls far within the rule which these cases illustrate, and differs from them only in the fact that the Detroit Company not only received no notice of the alleged fraud before it purchased its equitable estate, but it received no notice of it until it had also acquired the legal title to the timber."

In *U. S. v. Clark*, 200 U. S. 601 (50 L. Ed. 613), Mr. Justice Holmes, speaking for this Court, says:

"But the position is that Clark is privy to the original frauds and that, even if he is not, inasmuch as he did not purchase on the faith of the patent, he has no better title than the entryman would have had if the title had remained in them. * * * We may assume for the purposes of decision, as did the Circuit Court of Appeals, that the original frauds are made out, although there is great amount of testimony to good faith. But the point of law just stated has been disposed of by United States v. Detroit Timber & L. Co., *supra*. The United States is attempting to upset a legal

title. In order to do that it must charge Clark with notice of the original frauds. The fact that Clark, while he had merely equitable or personal claim against the Government, held it subject to any defects it might have, whether he knew it or not, as generally is the case with regard to assigned contracts not negotiable, was not equivalent to actual notice of the defects. It is recognized in the Act of March 3, 1891 * * *, that there may be a *bona fide* purchaser before a patent issues. The title when conveyed related back to the date of the original entries. Therefore actual notice must be proved. * * * The requirements that proof should be clear in such case has been repeated in a series of decisions, from the Maxwell Land Grant case (citation) to the United States v. Stinson (citation). There is nothing sufficient to show that Clark had actual notice of the arrangement by which Cobban got the lands. The allegation that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban, and paid him the market price and a substantial price even on the Government's calculations."

SUSPICIOUS CIRCUMSTANCES.

The following constitute what the Government characterizes as "the suspicious circumstances surrounding the transfer of title".

Lands all conveyed to Gregory, but deeds not promptly recorded. That the fact that no consideration was paid Gregory, but was paid Holbrook, was sufficient to put a prudent man on inquiry. We will consider these together. In order that the Court

may have a clearer understanding of matters pertaining to the recording and non-recording of these deeds, we will state that prior to the time of the purchase by T. D. Collins of the Holbrook stock, which was in February or March, 1905, (R. p. 1061), the title papers and the placing of them of record were in charge of Holbrook. Subsequent to that time or soon after, they were in the possession of Mr. Shurtleff and the placing them of record was in his hands and under his control. Seventeen of the deeds by the entrymen to Gregory involved in these appeals were recorded by Mr. Holbrook, (sixteen in 1904 and one in 1905) and seven by Shurtleff (one in 1909, three in 1910, and three in 1911) (see compilations of the Master, R. pp. 279 to 284). On page 285 of the Record the Master states that the compilation above referred to,

> "suggests that Holbrook recorded the Gregory deeds approximately as he received the patents from the Land Office, and that the delay under Mr. Shurtleff's management and the order of recordation discloses no governing plan whatever".

So far as the facts in connection with the recording of said deeds involves the writer's connection therewith, we pass them without comment, but earnestly invite the Court's attention to the evidence bearing thereon, and the Master's conclusions therefrom (R. p. 1193).

Upon consulting Schedule III, attached to the Master's Report (R. 279 *et seq.*), and remembering

that the bills in the 24 suits involved in these appeals were filed June 10, 1910, we find that sixteen of the deeds by the entrymen to Gregory, were recorded in 1904, over five years before the bills were filed, and that five of the remaining eight were also of record prior to the commencement of the suits.

Further consulting "Schedule III" we find that sixty-six of the deeds from the entrymen to Gregory, and involved in the 79 cases, were recorded before the suits were commenced; that out of fifty-seven recorded in 1904, nearly six years prior to the lodging of the complaints, thirty were recorded in September; that in the six cases where the entrymen conveyed direct to the company, the deeds were recorded in 1904, and before the issuance of patent. It is, of course, admitted that the deeds to Gregory were recorded after patent issued. It appears, therefore, that all but five of the entrymen's deeds to Gregory, three of which are involved in these appeals, were of record before any of these consolidated actions were commenced, from which it follows, that the Government for a number of years had constructive notice that the titles were being vested in Gregory, and still it makes no investigation. It lacks persuasive force for the Government to now claim it was injured by the alleged concealment of the deeds from Gregory to the corporation, and that, had it known of their existence, it would have sifted the matter, when it failed to do so upon notice that the titles were assembled in a private

individual. It should be noted that twenty-two of the deeds by Gregory to the company, speaking now of the seventy-nine suits, were recorded before the bills were filed.

All but seven of the deeds from the entrymen to Gregory, of the land affected by the 79 suits, being, as we have seen, of record, and Gregory having conveyed to the company, the title in the latter was complete, so that, had the Curtises and the Collinses made inquiry touching the deeds executed by Gregory to them and learned they were not of record, no suspicious circumstances would have been unearthed or doubts aroused. The recording of the deeds was not essential to pass or vest title, and if the party having their custody was withholding them from record for the purpose of concealing his own fraud, or the fraud of some one else, he would not, had he been interrogated, have disclosed it, but instead, would have offered what seemed to him to be a plausible explanation for his conduct. It is quite a common occurrence, for persons not to record deeds to them. It is in proof, that when, after the San Francisco fire of 1906, Shurtleff called the attention of E. S. Collins, who testified that so far as he could remember, it was the first knowledge he had thereof, that a number of the deeds coming into the company's chain of title had not been recorded, their recording was arranged for and directed. It is also important to bear in mind, as we have seen, that the Curtises and the Collinses never heard of any charges of fraud in

connection with these entries until *after* the issuance of patents by the Government. Now, assuming, for it is not proven, that the Curtises and the Collinses either instructed that the deeds be withheld from the records or knew that it was being done, what does that circumstance signify? Being at most a mere "badge of fraud", does it reach out and taint and void the original transaction in which Curtis and Collins were *bona fide* purchasers, and overcome and negative their positive testimony that they were ignorant of any alleged irregularities in the acquisition of these lands, and never heard of them prior to the issuance of patent? All are conversant with the familiar tenet, that the withholding of a deed from record, or otherwise concealing it, is a "badge of fraud", but that means nothing more than that, while such acts give evidence of, they are not in themselves sufficient to constitute fraud. The cases at bar present no such conditions nor circumstances as those exhibited in the Linn & Lane case, 236 U. S. 574 (59 L. Ed. 725). There, the proof pointed, with convincing force, to the fact that the corporation defendant had been organized for the *express* purpose of acquiring the property, then posing as an innocent purchaser, and invoking what its organizers thought to be the Statute of Limitations. That case illustrates that equity looks at the substance and not the form; the Courts very properly swept aside the fraudulent attempt upon the part of Smith, who owned *all* the land and *all* the stock of the company, to have it appear that he

as an individual and as, practically, a corporation sole, were separate entities. The inapplicability of the facts of that case to those of the present is so marked that it would be a work of supererogation to compare them.

Mr. Justice Holmes of this Court declares:

> "We now are not considering the effect of a fraudulent concealment of a cause of action. We are considering whether a man who knows that his title is bad and will be attacked can call into being a corporation which he owns, in order to save the property, make a deed to it, put the deed into his pocket, leave it unrecorded, and, without the need of trusting even an accomplice, can keep it with perfect security until the statute has run, and then set up that his creature owns the land." (No such condition here.)
>
> *Linn & Lane Timber Co. v. U. S., supra.*

The strain of the Linn & Lane case, was upon the point as to whether the organization of the corporation and the transfer to it of the lands there involved avoided the Statute of Limitations. The corporation appeared in the suit and pleaded, as we have said, that it was an innocent purchaser, with the further averment that, as to it, the action was barred because more than six years had expired since the issuance of patents, and it was in that connection that the "badge of fraud" doctrine arose and was applied to the conduct of the corporation in not recording the deeds.

The Government takes the position that because no consideration was paid Gregory, but was paid

to Holbrook, claimed to be a stranger to the title, that a prudent man acting in good faith would not purchase such a title without making further inquiry, and, if further inquiry had been made, the fraud must inevitably have been discovered. What would inquiries made of Gregory, who testified that he did not know and never saw any of the entrymen and knew nothing about the titles, have unearthed? Absolutely nothing. It must be remembered that the only fraud found in these cases, was a fraud, namely an agreement to convey to a third party, committed by the entrymen prior to making their initial entry, and Gregory knew nothing about that. Furthermore, if inquiry had been made of Holbrook or Tuman, it would have developed nothing. Under the circumstances, they were the last men in the world who would disclose to Curtis and Collins the methods, if fraudulent, resorted to by them in acquiring these lands; that is exactly what they would carefully and persistently suppress, and it must be remembered that the only notice fastened upon Tuman and Holbrook by the Court of Appeals, is constructive notice. Certainly the law will not fasten negligence upon a man for not seeking information of others, when it is clear it would have been not only idle to do so, but barren in results.

In *United States v. Beaman,* 242 Fed. 876, 881 (Circuit Court of Appeals, Eighth Circuit), Circuit Judge Sanborn speaking for the Court says:

> "Even if the company had been notified that the land had been procured in 1902 and 1903

under the homestead law, that knowledge would not have imposed upon it any duty to hunt up the patentee, the conditions surrounding the land and the knowledge concerning its value for coal deposits in the years 1902 and 1903 when Miskiel bought it. The patent evidenced the adjudication of the Land Department in 1903 that the land was not then known to be valuable for coal. That decision was impervious to collateral attack. The legal presumption was that all the proceedings leading up to the patent were regular and valid, and that all who had dealt with the property had done so honestly and rightfully. No one is bound to assume and hunt for fraud and wrong in the acts of those who have dealt in the title to land he is buying, when that title is fair on its face, in order to secure himself the rights of a *bona fide* purchaser."

In *U. S. v. Detroit Timber & L. Co.*, 200 U. S. 321 (50 Law. Ed. 499), Mr. Justice Brewer declares the accepted principle, as follows:

"We do not understand the law to be as stated, or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of this claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the

> rights of a purchaser in good faith (citing case). He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title."

And in *U. S. v. Clark, supra,* it is said:

> "Clark (who was found to be a *bona fide* purchaser) was not bound to hunt for grounds of doubt."

Referring further to the custody of the deeds by Holbrook, and their receipt from Gregory, we wish to direct attention to the fact that T. D. Collins knew nothing about it, hence an improper motive cannot be attributed to him. He testifies:

> "I could not say whether Shurtleff here took those deeds and put them on record, somebody took them and put them on record, but I was in the East and I don't know who it was" (R. p. 938).

While the custody and recording of the deeds relates to a condition arising *after* the deeds had passed and the purchase had been completed, and, therefore, we think, not very material, still we claim it shows that T. D. Collins was not a party to, and had no knowledge of, any frauds practiced in the obtaining of these lands by the entrymen or by any other person, for otherwise he would have known its details. His entire conduct discloses an innocence and frankness at variance with guilt or guilty knowledge. It is quite true he freely admitted his confidence in Holbrook to the extent of believing him honest, truthful and reliable, and,

as Mr. Justice Holmes declared in *U. S. v. Clark, supra:*

> "We cannot infer fraud from merely more or less familiar relations between some of Clark's agents and Cobban"

and the same would, for like reasons, be true as to Holbrook and Curtis and Collins. The law presumes men are honest, and certainly will protect those who act upon such presumption, there being nothing present indicating they should act otherwise. There was no negligence upon the part of T. D. Collins, J. G. Curtis or Curtis and Collins, or the corporation in permitting Holbrook to take possession of the deeds, or to attend to their recordation, and the Government has not shown how or in what manner it has been injured thereby. Indeed, it does not base injury thereon, but appeals to those acts, as evidentiary circumstances showing both participation and knowledge, but, to give them such effect, is opposed to the entire record and the finding of the Master. To so regard them, rests upon a mere suspicion. Granting that the corporation committed to Holbrook the management of its affairs, thereby manifesting its trust in him, there is no evidence of any conduct upon his part, brought to the attention of the company, which would excite their suspicion or prompt an investigation. *Kilbourn v. Sunderland,* 130 U. S. 505 (32 Law. Ed. 1005), is authority for the proposition that,

> "a principal reposing confidence in an agent and therefore neglecting some source of knowledge which he might have sought, is not charge-

able with what he might have found out upon inquiry aroused by suspicion."

This just rule forcibly applies to numerous phases of this litigation, and must, of course, in its application, be considered with the further fact that Holbrook had his own interests to promote and protect, and, for that reason, would, and, as we will hereafter point out, the law presumes he did, suppress and withhold all matters hostile to, or which might endanger, such interests, and this was Holbrook's position at all times. The uncontradicted testimony is, and such is the finding, that both he and Tuman were of the impression the entrymen could neither contract to convey, nor convey, until after final proof. This explains why Holbrook would withhold information which, reaching the ears of the buyers, would cause them to decline to complete the purchase. The motive for such conduct becomes at once apparent when we are reminded that Holbrook was not paid for the land until the entry "was made good" (R. p. 928).

The statement that Holbrook was a "stranger to the title" is without foundation, for, as it is abundantly established by the record, as appears from what has already been said, that Gregory was a passive trustee holding the record title for Holbrook, to be conveyed upon the latter's request.

Suppose Curtis and Collins, in conformity to the exactions set forth in *Simmons Creek Coal Co. v. Doran,* 142 U. S. 417 (35 Law. Ed. 1063), had looked

to the title papers under which they bought, and been charged with notice of all the facts appearing upon their face, "or to the knowledge of which anything there appearing" would conduct them, they would not have gleaned even a hint of anything wrong, much less of fraud or irregularity. The papers were regular on their face, and all of the Land Office proceedings free from suspicion. The Government, upon the very same papers, passed the lands to which they related, to patent, and it can hardly now complain because they were not inspected by Curtis and Collins, when it would have disclosed nothing irregular, much less assert, if they had been so inspected, that Curtis and Collins would have discovered or been led to the discovery of conditions which its own officers failed to uncover, or even suspicion.

As we have pointed out if Curtis and Collins had interviewed Gregory and interrogated him relative to the fact that the title to these lands was being taken in his name, and the reason therefor, he would certainly have replied as he testified, that he was merely holding the title for Holbrook and that he had no interest in the lands and paid no consideration for them, and it was quite proper that Holbrook should retain title until the lands had been paid for by Curtis and Collins, and as we have said T. D. Collins testifies that the "lands were paid for when the claim was made good" (R. p. 928).

If the argument is, that the assembling of this land in the name of Gregory should have aroused

the suspicions of Curtis and Collins, and prompted them to institute an investigation, the point is effectually disposed of by the following, taken from the decision of the Supreme Court in the Clark case:

> "So far as any inference was to be drawn from the nearness of the respective dates of the receiver's receipts, the deeds of the entryman to Cobban (corresponding to Gregory here), and the deeds of Cobban to Clark (the latter corresponding to the company here), it was as open to the officers of the Government as to Clark, if indeed, he knew anything about those dates; yet they seem to have suspected nothing. * * * Clark, his agents and advisors, testify that they did not know or suspect anything wrong."

Such is the testimony of Curtis and Collins here.

It strikes one as axiomatic that equity will not presume wrong or infer knowledge thereof from excusable failure to do a certain thing, especially where and when it appears, as it does in the instant cases, that, had it been done, no suggestion of irregularities or fraud would have ensued, but every record in the proceeding would have been found to be in conformity with law and, on its face, free from infirmities. A rule which would attach prejuidicial inferences and hurtful results to the omission to do something which, had it actually been done, would have disclosed nothing wrong in the transaction to which it related, would indeed be a harsh and exacting one.

This leads us to the inquiry, did the Curtis, Collins and Holbrook Company have notice of the fraud by which the patent was secured from the Government?

If we speak of the physical things done in accomplishing the transfer, then it is true that the entrymen's deeds ran to Gregory, and he in turn deeded to the company, but that was the form the transaction took and was not its substance.

We have seen, the Master and Court of Appeals so found, and there is nothing in the Record to the contrary, that Gregory held the lands for Holbrook, —that point is beyond controversy. It follows therefore, that up to the time that Gregory, at Holbrook's request, conveyed to the company, Holbrook owned the lands, and, under such circumstances, when Gregory deeded to the company, it was in truth and in fact the deed of Holbrook; it was in effect just as much his deed as it would have been had he, Holbrook, instead of taking the "short-cut" he did, have had Gregory convey to him and he in turn executed a deed to the company. Or, in other words, Holbrook made Gregory his agent to receive and hold the title for him, and, when the time came, made him his agent to convey it, and hence the act was Holbrook's. It is unnecessary to go into the legality of such an arrangement, for Gregory did not question or deny it, but testifies that it actually existed. It was a resulting trust, pure and simple, valid without a writing, and, as we have said,

when Gregory conveyed, it was the conveyance of Holbrook.

We think the Court of Appeals is in error when it says that Holbrook, which includes Tuman, was not the vendor, and Curtis and Collins were not the vendees (R. p. 230).

It must always be remembered that the original deal between Holbrook and Curtis and Collins called for the acquisition of public lands through the use of forest lieu scrip, which the law plainly allowed, and that the modification or extension thereof so as to include lands acquired under the Timber and Stone Act, was in the open, and did not call for the commission of fraud. The following, taken from the testimony of D. G. Curtis, shows the correctness of this statement. He testifies:

> "There were further conversations by these various parties that have been named with Mr. Holbrook touching his acquiring of further lands. After this original contract was taken in Mr. Holbrook represented that there were other lands. I think that was shortly after. I don't remember just how long. I think it was before the Curtis, Collins & Holbrook Company was incorporated. I don't remember that anybody was present at that time. At that conversation Mr. Holbrook stated that there were other lands that could be acquired and he wanted to know whether we wanted to go on furnishing more money to buy more scrip and to locate the lands under the same arrangement as the original contract. I consulted my father and Mr. Collins and they agreed to go on and take more land, and the scrip was bought and filed and the lands acquired.

Q. After that did you have any further conversation with him about furnishing land?

A. *Along toward the last, scrip was hard to get. Mr. Holbrook said that good scrip was hard to get, he was having difficulty in getting it, that he had other lands cruised out and that entrymen were coming in there and filing on them, and he was very much distressed, but he said that he thought that those men would probably be willing to sell after they had acquired titles, and that the probabilities were he could buy the land for about the same price that it would cost to scrip it;* and he wanted to know if he should buy some of these lands that would be satisfactory to the company. I communicated with my father and Mr. Collins and they said that they would be willing to take any lands to which absolutely good title could be delivered, and would be willing to pay him the same price for them as they paid him under the forest reserve filing.

* * * * * * *

"After that I had further conversations with him in relation to those lands, at least Mr. Holbrook said that he could acquire other lands but they would cost more money and asked me to get an authorization from my father and Mr. Collins that they would allow him $10 an acre instead of $7.50 which was finally agreed to. They consented to that at last. That was the last land I think that was bought from Mr. Holbrook" (R. pp. 1009-1010).

To the same effect is the testimony of E. S. Collins, son of T. D. Collins, which is as follows:

"Q. You knew up in the State of Washington that they (timber entries) had not been gotten on the square?

A. I knew some had been.

Q. That is, in which others had got others to go out and take up land for them?

A. Yes. *I wanted to be sure that nothing of that kind was done here.*

Q. You discussed that with Mr. Holbrook?

A. I cannot tell you the details of the discussion with Mr. Holbrook; I discussed it with Mr. Holbrook until I was satisfied in my mind that everything would be done fair and square and straight and stand all investigation and the title be good because it was obtained fair and square and above-board; and when I discussed it that far, and had his personal assurance that it would be done, having entire confidence in the man, his integrity and character, I dropped it entirely and we never went back to it" (R. pp. 979-980).

Whether the deal covering the lands originally acquired through timber entries, be regarded as a continuation of the contract of December 19, 1901, which dealt with scrip (R. p. 1275), or as an entirely distinct and separate transaction, there is, as the Master states, and as we have already pointed out, a strong analogy between them. In the latter, the purchase price was agreed upon, and Holbrook was paid part cash and part stock, the proportion of stock being small. He sees to it that the title does not pass from his control until he is paid, and, therefore, it is taken in the name of his son's friend, Charles E. Gregory, and it does not pass out of Gregory until the price, which Holbrook is to receive, is actually paid. True it is, that in the case of the timber entries there was no examination of the title, but there was no paper or record title to examine. The only evidence of title would be the filing of the application or the receiver's receipt upon the making of final proof.

It was arranged, however, that Holbrook should, and he did, guarantee such title. This was protective to Curtis and Collins, and not in any manner indicative of fraud, and especially is this true in the light of the important circumstance that, even had they or their attorney made the most searching examination of the records in the Land Office, it would have disclosed naught casting doubt upon the validity of the entries. In this deal also, as the Master found, Holbrook and Curtis and Collins were dealing at arm's length.

The same similarity is present as to matters showing the legal relations of the parties, namely, that Holbrook is the seller, and Curtis and Collins the buyers, in the negotiations and contract covering the timbers entries. We have previously referred to portions of the evidence bearing upon the acquisition of these lands from the entrymen and, as well the evidence, showing that Holbrook led Curtis and Collins to believe the entries had already been made, and that, in any event, the proceedings, which would culminate in the issuance of a patent, would be in all respects legal and regular; it appears, further, that T. D. Collins himself took an active part in the negotiations which finally resulted in a contract for their sale and purchase at a price of $7.50 per acre; that subsequently Holbrook approached D. G. Curtis and demanded that the price be increased to $10 per acre; that Curtis took it up with his father and T. D. Collins, and such increase was consented to; certainly, Holbrook represented himself in that transaction, and was not, under any as-

pect of the situation, representing Curtis and Collins or the Curtis, Collins & Holbrook Company. Neither Holbrook nor Tuman in a single instance was a selling agent for the entrymen. Now, if they were not representing the entrymen and were not purchasing for themselves, but were buying as agents for Curtis and Collins, or for the corporation, then what becomes of, or what bearing has, the fact that a claim of 160 acres was costing them (Holbrook and Tuman) about $600 and they were selling it for $1200, when the price they were receiving was $7.50 per acre and for $1600 when the price to them was raised to $10 per acre—a profit of $600 in one instance and of $1000 in the other. Would that indicate any relation other than that of strangers, so far as the deal was concerned? The proof is that these sums were paid Holbrook and Tuman largely in cash by Curtis and Collins, and the latter gentlemen directed conveyances to the corporation, taking stock in payment (R. pp. 497-498). In the light of these facts, we ask, what becomes of the theory of agency for the corporation, or of a fraudulent scheme to which Holbrook and Curtis and Collins were parties? We take it, no sane man would become a party to an infamous and fraudulent plot, in which the spoils to be divided consisted chiefly of his own money, and then give the whole of it to his comrades in crime. Neither would a man of any business sense pay his agent a commission of 100% in one instance and 166⅔% in the other for the purchase of land for him. He would hardly submit to such a liberal di-

vision on the one hand or compensation on the other, and, emphatically so, were he cognizant that the title had been acquired through fraud, thereby giving him a cudgel to exact a more even apportionment. It should be here suggested that Holbrook cautioned Tuman not to let Curtis and Collins know what they (Holbrook and Tuman) were paying the entrymen (R. p. 502). Tuman testifies that he and Holbrook were trying to keep from the Curtis, Collins and Holbrook Company the price they were paying for the lands; "that it was none of their business" (R. p. 502). This certainly does not indicate that Curtis and Collins, or either of them, were "in" on the deal, or participants in the fraud. If Curtis and Collins and Holbrook and Tuman were working together in the execution of this alleged scheme to secure the lands in controversy by illegal methods, and each had knowledge of what the other was doing, then Curtis and Collins were certainly an easy prey and deficient in ordinary common sense, for they were profiting nothing. It is in evidence that the price they were paying for the lands was, if anything, above the market (R. p. 1213), hence their position was about as follows:

They were furnishing the money to pay, and paying, the entrymen, what they were asking for the lands; on top of this, they were paying Holbrook and Tuman their price, and withal paying above the then market value, so that at the end they had paid full value for the land and therefore profited nothing from their participation in the fraud. The

rise in the value of the land was not one of the stakes of the alleged fraud; that was a chance—a speculation on the future, honestly taken by Curtis and Collins—and carries with it no suggestion of wrong. The lands subsequently rose in price, but that does not indicate fraud any more than a decline would establish it did not exist. It is quite true that it was admitted at the hearing that the lands were, at *that* date, worth $50 per acre, but that was far from conceding they were of that value when they were acquired. Tuman and Holbrook were paying the entrymen with their personal funds. The Master so finds (R. p. 524) and the testimony sustains the finding. As has been said, they acquired the lands from the entrymen and, pursuant to the agreement so frequently referred to herein, they in turn sold them to Curtis and Collins, who provided the money which paid Holbrook and Tuman, Curtis and Collins causing them in time to be conveyed to the corporation, taking stock in payment, such transaction being authorized by resolution properly adopted (R. pp. 1057-1058).

When we bear in mind that Holbrook and Tuman made upwards of $250,000 out of the timber transactions they had with Curtis and Collins, the charge that the last-named gentlemen joined them in, and were parties to, the frauds, stands in the precise position of a similar charge made against Clark (purchaser) in connection with Cobban (seller) in *United States v. Clark*, 138 Fed. 300, and of which accusation Judge Ross said:

"If the Appellee had been willing to become a party, with Cobban and the others named, to the alleged frauds upon the Government, or if Cobban had been acting as the agent of the appellee, as is alleged in the bill, it is passing strange that the appellee should have paid Cobban $217,571.25 for the timber and lands in question, as the counsel for the Government admit that he did. Cobban, it is claimed, paid only the Government price of $2.50 an acre for the lands, $100 to each of the entrymen and entrywomen, and the incidental fees and expenses, and it is incredible that a man of brains and of large business affairs, as the record shows the appellee to be, would, if Cobban had been his agent, or if the appellee had been dishonest enough to have joined Cobban in the alleged fraudulent scheme to obtain lands from the Government in violation of its laws, have paid him $217,571.25 for what Cobban in pursuance of the same undertaking paid but a mere trifle in comparison. It is, we think, incredible that the appellee would have permitted his partner in the fraud to profit so largely at his expense, if he had been a party to it. The evidence, in our opinion, fails to justify the contention of appellant's counsel that Cobban was at any time acting for the appellee, or that the latter was in any way a party to the alleged frauds, or ever heard anything of them until after he had made his purchases and paid his money."

The cases at bar are the counterpart of the Clark case, and if we substitute Holbrook for Cobban and Curtis and Collins for Clark (appellee) the words of Judge Ross apply to and accurately describe the situation presented here.

The agency claim utterly fails under the testimony—it is a makeshift, a sheer assumption, barren

of support unless there is to be attributed to every act and deed of the parties a meaning exactly the reverse of, and at variance with, what they plainly indicate and which would be given them in the commercial world—in the every-day affairs of life. An analogous position was taken by the United States in the Clark case upon facts similar to those here, and this Supreme Court met it in these words:

> "The allegation that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban, and paid him the market price, and a substantial profit even on the Government's calculation."

Again, how aptly and completely this language meets and disposes of the present situation. Curtis and Collins were in Pennsylvania; Holbrook in California. Curtis and Collins dealt as a purchaser from Holbrook and paid him above the market price —and, as we have seen, a very substantial profit. It may be and doubtless is true, that a feeling of faith and reliance in Holbrook gradually became engendered in Curtis and Collins, and that, by reason of the different transactions they had with him, they grew more trustful of him and gave him added confidences, but this was largely after negotiations for the lands, the title to which is under examination here, had been concluded, and prior to any knowledge upon their part of any charges of irregularities in the timber entries upon which the patents attacked in the appeals are based; but there was no wrong in these gentlemen holding

and extending such confidence. Provided they were not culpably negligent in so doing, or did not do so for the purpose of enabling him to commit the fraud which it is alleged he was a party to in the instant cases, neither of which elements is present here. This is to be said, however, that no matter to what extent, or how much, Curtis and Collins reposed confidence in Holbrook, it was not fully reciprocated by him. He never failed to see to it that he was properly and securely protected, and that, so far as his rights were involved, nothing was left to faith, unstayed by conditions protective to himself, and in neither the scrip nor the timber entry transactions did he for one moment lose control of the situation, or permit the titles to the lands to pass beyond his dominion, until he had been paid the agreed price. In the one instance the title vested in Thompson until Holbrook "in writing" directed its transfer, and in the other, as we have seen, in Charles E. Gregory, his trustee, friend and representative, subject to his (Holbrook's) directions. No one will have the temerity to assert that Gregory would have conveyed to any one a single acre of the lands, assembled in his name as the representative of Holbrook, except upon Holbrook's or his son's direction.

The Government, doubtless will question the Master's statement that Curtis and Collins were acting "at arm's length with Holbrook". "Dealing at arm's length", as this Court well knows, does not exclude the possibility or probability of mutual con-

fidences nor mean the interested parties are conducting their business negotiations *vi et armis*. It merely has reference to a commercial transaction wherein the opposite parties thereto are laboring to consummate a deal upon terms and conditions which each regards as favorable and advantageous to himself. It in no manner assumes that either is proceeding upon the presumption that the other is dishonest or to be distrusted. So, where we find, as we do here, that one party (Holbrook) is selling lands to another (Curtis and Collins); that he is striving for the best price possible, and is concealing the cost of the lands; is arranging that the title does not pass from his control until he is fully paid, and is guaranteeing the titles, and that the other parties are insisting that they receive good title, and check the descriptions in the deeds before accepting, they are "dealing at arm's length" within the meaning of that phrase. The fact that in a real estate transaction the vendee may have entrusted the possession and recording of the deeds to the vendor, or accepted the latter's guaranty of title, does not deny or gainsay they are acting at arm's length. Neither does that result follow from the circumstance that the purchasers did not cruise the land before consummating their deal, where, as here one of them (T. D. Collins) was familiar with it, and further investigation and subsequent inspection demonstrated the correctness of his impressions in that regard.

Nor does the circumstance that Curtis and Collins did not have the titles examined by an attorney, but accepted the assurances of Holbrook that they were good, in any manner evidence a premeditated purpose on their part not to closely follow or probe the methods pursued by Holbrook and Tuman in acquiring these lands. They had a perfect right to accept the titles without examination and fraud will not be inferred therefrom, and especially is this true in the light of the fact that such an examination would not have resulted in even a suggestion that they could be questioned. Upon the presentation of proper deeds, valid on their face, to Curtis and Collins Company, with the assurance that they vested good titles in the corporation, the law did not cast upon them or the corporation the duty or caution of making further inquiry, there being an absence of facts suggesting its necessity. As said by Judge Sanborn in *U. S. v. Detroit Timber & Lumber Co.* (supra):

> "Nor was there any duty upon this purchaser, in the absence of other facts suggesting inquiry, when the seller presented conveyances to it apparently valid, and gave its assurance that they vested perfect titles in it, to make further investigation. The presumption always is, in the absence of countervailing evidence, that men tell the truth and that bills of sale and deeds prima facie valid are actually so, and purchasers may lawfully act upon this presumption."

Or, in the words of Mr. Justice Brewer, spoken when the same case reached this Court (U. S. 321, 50 L. Ed. 499, p. 503):

"We do not understand the law to be * * * that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that therefore he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchasers of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith (citing cases). He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title."

See *U. S. v. California and Oregon Land Co.*, 148 U. S. 31 (37 Law. Ed. 354), which was an action instituted by the Government to set aside patents to lands issued pursuant to the terms of a Wagon Road grant.

At this point we wish to refer to, and quote from, a few decisions which announce to what extent constructive notice and what character of knowledge imperatively casts upon a party the duty of making further investigation.

We take the following from the opinion of Judge Sanborn in the Detroit Timber and Lumber Co. case (~~C. C. A. pp. 674-5~~): 131 Fed 668-674.

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"'Where a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question'. Ware v. Lord Egmont, 4 D. M. & G. 460, 473; Sugden on Vendors, 622; Wilson v. Wall, 73 U. S. 83, 91, 18 L. Ed. 727. 'What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell' (citing cases). The notice to the Detroit Company meets none of these tests of constructive notice where actual notice is absent. * * * The receiver's final receipts were not notice of fraud and perjury in their procurement. They were notices of honesty and legality in the proceedings that induced their issue. They were prima facie evidence that those who received them had the right to patents to the lands, and they raised the legal presumption that entrymen and officers alike had complied with the law."

Referring to the same case in the Supreme Court, *supra,* and quoting therefrom, we have:

"The rule in respect to constructive notice was thus stated in Wilson v. Wall, 6 Wall. 83, 91, 19 L. Ed. 727, 730:

"'When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether

he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence' " (200 U. S. 321 (50 L. Ed. 499)).

And, again, in *Townsend v. Little,* 109 U. S. 504, 511, 27 L. Ed. 1012, 1014:

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the Court will not even allow of its being controverted (citing cases). * * * As said by Strong, J., in Meehan v. Williams, 48 Pa. 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell (citing cases)."

In point here, is the following, taken from the Master's report:

"No examination of the title to the entries was made until 1905, when Collins bought out the Curtis and the Holbrook stock. At that time Mr. Shurtleff, as his attorney, examined the paper record of the cases and naturally found everything regular. This record consists of the Register's receipts, the deeds to Gregory, and the deeds from Gregory. Mr. Shurtleff did not have the Land Office records. If he had examined them then or at any previous time they obviously would have disclosed no irregularity. They would have passed his inspection just as they passed the inspection of the Land Office officials. * * * But let us go farther than the cases warrant and assume an obligation upon those in charge of this matter to examine further. If they had been able to hunt out and find the original entrymen it is not likely that the entrymen would have testi-

fied differently from their testimony in the Land Office if they had been willing to talk at all" (R. p. 219).

According to the authorities, nothing short of culpable negligence in not making an examination, beyond what appears from the title papers, of the circumstances attending the acquisition of these lands by the entrymen, will attribute to Curtis and Collins constructive knowledge of events, of which they testified they knew nothing until long after the issuance of the patents assailed in the appeals. A definition of "culpable negligence", a situation usually arising in actions for damages for personal injuries, cannot easily be formulated from the decisions, but we think the following, not original, but epitomized by us from "*Words and Phrases*", Vol. 3, pp. 1780-1781, amply and fairly describes it: Culpable negligence is the omission to do something which a reasonably prudent and honest man would do, or the doing of something which such a man would not do, under the circumstances surrounding the particular case, or it is the want of such care as a man of ordinary prudence would use under similar circumstances. All negligence, to be culpable, necessarily implies a failure to perform some duty.

Applying these tests to the acts of Curtis and Collins, in what particulars can it be said they were culpably negligent? To state the facts showing they were not negligent would be to practically repeat the entire record. As we have seen, the

decisions are, that no such duty was imposed upon them, therefore, clearly, they were not culpably negligent, if, indeed, they were negligent at all. The wisdom or reasonableness of their acts, or the inferences to be drawn from their omissions, are not to be determined in the light of *subsequent* events, but from conditions prevailing at the time of their commission and omission, and so determined, they are not even open to criticism, much less censure.

In prior pages we have referred to the finding of the Master and the evidence supporting it, that in these transactions the relation of principal and agent *did not* exist between Curtis and Collins and Holbrook, but, upon the contrary, the former were vendees and the latter a vendor.

We will, therefore, make no further reference to the facts bearing upon that point, except where it may aid in making the application of the legal principles which we claim are controlling here.

In the first place, it is clear that both Holbrook and Tuman had a great deal at stake when they opened their negotiations with Curtis and Collins which resulted in the sales to the latter. Holbrook, so his son testifies (R. p. 1064), was broke, and Tuman had some money, not to exceed nine or ten thousand dollars, when he commenced his cruise of the timber, which amount doubtless had been materially reduced when the cruise was completed. It was a game in which both were playing for large stakes and the Record shows how successfully they played it. We are under the mark when we say

that Holbrook and Tuman made upwards of $250,000 out of all their transactions with Curtis and Collins.

Accepting the figures of appellant that Holbrook pursuant to his agreement with Curtis and Collins, acquired the title to some 30,000 acres of lands originally taken up under the stone and timber act (Brief p. 11), and, remembering that the profit to him on each 160 acres, when the price paid him by Curtis and Collins was $7.50, was approximately $600, and, when the price per acre was $10, the profit was approximately $1000 on each 160 acres, we find that he made upwards of $100,000 from these sales, all of which, aside from the fact that the Master found that Holbrook was a vendor, establishes that his interests were adverse to those of the company in that if he disclosed the concealed and latent defects in his title, assuming he had knowledge of them, he would have lost the sale and the substantial profit for which he was striving, and which he eventually secured. If it should be attempted to scale these profits by claiming that his loss should be restricted to the 24 cases involved in these appeals, the rule for which we contend would still apply, for it is not the magnitude, but the presence, of the adverse interest, which is decisive.

Upon this branch of the case the Master says:

> "The evidence fails to show that Holbrook actively participated in the fraud upon the Government, that is, the making of the agreement prior to entry. This was carried out by Tuman's agents, Remick, Heppe and the others. (I am, of course, assuming for the purpose of

the discussion that the fraud has been established.) In the absence of actual knowledge, therefore, we have a question presented of notice on the principles of agency. Holbrook, during all these transactions, did none of the actual work in the field. He attended to the financial end of his dealings with Tuman and to the office work in San Francisco. It is true that Tuman testifies that Holbrook knew everything that he knew. When we consider, however, that the determination of whether a prior agreement was made turns upon each particular case, and is often decided on very narrow lines depending on what was said and done between the entryman and the locating agent, it is not only difficult to believe that Holbrook knew all these details, but almost as difficult to believe that Tuman himself knew them. It must be remembered that their plan and so far as they knew its actual carrying out was to avoid anything like an agreement. It therefore comes to this: that Tuman is charged with notice of whatever fraudulent agreement Remick or Heppe may have made with an entryman by a presumption in the law of agency; that Holbrook likewise is charged with notice by reason of a presumption arising out of the relation of partnership between him and Tuman (R. p. 222) and that the corporation is charged with notice by reason of a presumption arising out of Holbrook's tenure of the office of vice-president of its board. *It does not strike one as just that the defendant corporation should lose the property which it has purchased by reason of this pyramiding of legal fiction* (italics ours).

"It is, however, entirely clear under the law that the defendant corporation here was not chargeable with notice. To the general rule upon which the Government here relies there

is a well-settled exception. The reason of the principal rule which charges the principal with notice is that it is the duty of the agent to disclose to his principal all notice or knowledge which he may possess and which is necessary for the principal's protection or guidance. This duty the law presumes the agent to have performed and imputes to the principal whatever notice or knowledge the agent possesses, whether he has in fact disclosed it or not. The Distilled Spirits, 11 Wall, 367; Mechem on Agency, sec. 719. The exception arises where the agent is in an adversary relation or otherwise so related to the subject-matter that this relation or the agent's previous conduct renders it reasonable to believe that he will not disclose the information he possesses. In the present case, for example, when the company took the conveyance from Gregory, though Holbrook was its vice-president at the time, he was at the same time in an adversary relation, he himself being the seller of the property. It is idle to say that he would have disclosed any (R. p. 223) knowledge of fraud in the titles which he presumed to possess (contrary to the actual fact). Holbrook was not buying this land for the company. *He was buying it from others and selling it to the company at a considerable profit above its cost to him, which profit he retained and was expected to retain. It cannot be assumed that he told or would tell the company of any defect in its title, and lacking such assumption in reason the law does not raise any presumption of notice. It will be remembered also that Holbrook had assured both of the Collinses that these timber and stone titles would be first-class titles. The exception noted is well established by a number of cases"* (R. p. 224).

We submit the following additional authorities:

In *Oregon & C. R. Co. v. Grubbissich,* (Circuit Court of Appeals, Ninth Circuit), 206 Fed. 577, it is held:

> "Where the interests of officers or stockholders of a corporation are adverse to it, their knowledge of facts and circumstances affecting such interest will not be imputed to the corporation."

Circuit Judge Stone, in *Interstate Nat. Bank v. Yates Center Nat. Bank,* 245 Fed. 294, 295 (Circuit Court of Appeals, Eighth Circuit), says:

> "The basis of imputing knowledge from an agent to a principal is that the principal cannot be heard to deny responsibility for knowledge acquired by his agent, which would affect his principal's business, and which he would naturally communicate to his principal or use for his benefit. The imputation of knowledge to the principal is but the application of a presumption that the information was communicated by the agent. Like most presumptions, it is baced upon that legal method of working out justice which often is called into action by necessity, to-wit, to treat as existent that which normally and naturally would occur, but which is difficult or impossible of direct proof by the party upon whom the burden of proof rests . If the circumstances surrounding the agent in respect to the knowledge are such that he would naturally conceal it from his principal, the law will not presume, in the absence of proof, that he did the unusual and unnatural thing of communicating it. Nor will it, proof being absent, hold his principal as possessing information he normally would not have."

The proof is that Holbrook did not communicate to Curtis and Collins any knowledge or notice he may have had showing or tending to show fraud on the part of the entrymen in acquiring these lands from the Government; upon the contrary, the evidence is that he stoutly maintained that the titles were good and he never, so far as the Record discloses, departed from that position.

In *Lilly v. Hamilton Bank of N. Y.*, 178 Fed. 53 (Circuit Court of Appeals, Third Circuit), it was held:

> "Where the payees of a note fraudulently acquired offered it to a bank of which they were directors and members of the discount committee, but withdrew from the meeting of the committee, and took no part in the committee's determination of the advisability to purchase, and did not disclose any facts which would have led to the discovery of the fraud, the payees' knowledge thereof was not imputed to the bank because of their relation to it, under the rule that the law will not impute notice from an agent to his principal where such notice would necessarily prevent the consummation of the transaction in which the agent was engaged."

Lanning, Circuit Judge, speaking for the Court, at page 56, says:

> "In submitting the question of fraud to the jury the trial Court charged, in substance, that, if they should find that the Thomases disposed of the note to the bank in fraud of the rights of the defendants, the law would not impute to the bank knowledge of that fraud merely because one of the Thomases was the president, and both of them were directors and members

of the discount committee, of the bank" (citing cases).

* * * * * * *

"If, therefore, the Thomases be considered as having acted with the other three members of the discount committee, because of their presence at its meeting and the requirement of the by-law that the paper accepted by the committee should 'receive the unanimous consent of all members present at the meeting before being entered', we nevertheless think that notice of the alleged fraud of the Thomases cannot be imputed to plaintiff."

In *Reed v. Munn,* 148 Fed. 737 (also decided by the Circuit Court of Appeals, Eighth Circuit), it was held:

"Although a purchaser from one who, by reason of financial distress, may feel compelled to sell his property at a sacrifice, yet, if the transaction is free from duress, deceit, or fraud, on the part of the purchaser, and he pays a valuable consideration therefor, although he may not pay an adequate price for the property, the transaction is not assailable by a stranger on the ground that such purchaser is not a bona fide purchaser."

"To affect a corporation acquiring the legal title to real estate with notice of an outstanding equitable claim, knowledge thereof to a stockholder or director prior to the organization of the corporation will not ordinarily affect the corporation; and such knowledge on the part of a director after the organization of the corporation will not bind the corporation unless such director receive such notice either while acting for the corporation or under circumstances which, in fidelity to the company, it was his duty to impart to it."

"As applied to the facts in this case, courts of equity will not impute to a purchaser for a valuable consideration notice of an outstanding equity, unless the circumstances are such as to warrant the Court in saying, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. It is not sufficient that he had the means of obtaining, and might with prudent caution have acquired, the knowledge, but whether the fact of not obtaining it was culpable negligence."

(Writ of Certiorari was denied in this case, 207 U. S. 588.)

Also,

Mecham on Agency, 2nd Ed., Vol. II, Secs. 1813-1815.

Arlington Brewing Company v. Bluethenthal and Bickart, decided by the District of Columbia Court of Appeals *(Ann. Cases, 1912 C.,* page 294), held:

"Where an officer of a corporation transfers to it for value a promissory note owned by him individually, his knowledge of a failure of the consideration for the note is not imputable to the corporation, because in making the transfer he was not acting for the corporation, but was dealing with it."

That is precisely this case.

See also:

In re: *Senoia Duck Mills,* 193 Fed. 711;

American National Bank v. Miller, 229 U. S. 517 (57 L. Ed. 1310);

In re: *United States Hair Co.,* 239 Fed. 703 (Circuit Court of Appeals, Second Circuit);

Harriman Nat. Bank v. Seldomridge, 240 Fed. 111, 114 (Circuit Court of Appeals, Second Circuit);

Hadden v. Dooley, et al, 92 Fed. 274 (Circuit Court of Appeals, Second Circuit);

Skud v. Tillinghast, 195 Fed. 1 (Circuit Court of Appeals, 6 Circuit);

Alexander Eccles & Co. v. Louisville & N. R. Co., 198 Fed. 898, 900 (D. C. Ala.);

Union Central Life Ins. Co. v. Robinson, 148 Fed. 358 (Circuit Court of Appeals, Fifth Circuit);

Hudson v. Randolph, 66 Fed. 216 (Circuit Court of Appeals, Fifth Circuit);

Thomson-Huston Electric Co. v. Capital Electric Co. (Circuit Court), 56 Fed. 849;

Yeiser v. U. S. Board & Paper Co., 107 Fed. 340 (Circuit Court of Appeals, Sixth Circuit);

American Surety Co. v. Pauly, 170 U. S. 133 (42 L. Ed. 977);

Bank of Overton v. Thompson, 118 Fed. 798, 801 (Circuit Court of Appeals, Eighth Circuit);

Weber v. Richardson, 147 Pac. Rep. 522.

It will doubtless be claimed that there is an exception to the rule, declared in the foregoing au-

thorities, which exception is reflected in the following, taken from the opinion of Mr. Justice McKenna in *McCaskill v. U. S.* 216 U. S. 505 (54 Law Ed. 590-596):

> "Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be atttributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, Secs. 663, 664, and 727. The principle was enforced in this court in Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. Ed. 1063, 12 Sup. Ct. Rep. 239. In that case a corporation claimed title to land through a deed of its corporators, one of whom became its president. Of the effect of this the court said: 'Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators and the president was the knowledge or notice of the company; and, if constructive notice bound them, it bound the company."

But the McCaskill case is easily differentiated from those under consideration. That was a suit by

the United States to cancel a patent issued to one Ward upon a commuted homestead entry. Ward had utterly failed to comply with the laws regulating the acquisition of a homestead, and had clearly committed a fraud upon the Government.

As appears from the opinion, the bill alleged that the land described in the patent was conveyed by Ward to a copartnership composed of J. J. McCaskill and E. L. McCaskill, which was engaged in the manufacture of lumber; that they afterwards incorporated under the name of J. J. McCaskill Company, of which company J. J. McCaskill was president and "Robert" E. L. McCaskill (probably E. L. McCaskill) was secretary, and that they owned a *"large"* majority of the stock of the corporation and had entire management and control of its business and affairs; that after patent the corporation took over from J. J. McCaskill, or J. J. McCaskill & Company, the homestead entry of Ward, with full knowledge of its president and secretary of the negotiation between the company and the entrymen by *Warren Ward,* who, while it is not clear, was apparently an agent of the company, and "with all the knowledge and notice of the said McCaskill & Company of the fraud and duplicity practiced by William Josiah Ward (homesteader) in obtaining the patent from the United States". It therefore seems that it was a case of agency, *Warren* Ward being the agent, and not, as here, a case of vendor and vendee.

But whether or not Warren Ward acted as agent for the copartnership of McCaskill & Company, it is certain that the latter, before it purchased, had full knowledge of the fraud practised by the homesteader; and, when the copartnership turned the property over to the corporation, a *"large majority"* of the stock being held by the persons who composed the copartnership, it was held to be notice to the corporation.

The situation there was similar to the one presented in the Linn & Lane case, 236 U. S. 574, 59 L. Ed. 725. J. J. McCaskill and E. L. McCaskill, who made up the copartnership, were practically the corporation, and the Court swept aside the fiction that J. J. McCaskill & Company, a copartnership, and J. J. McCaskill Company, a corporation, were separate entities.

The rule announced by Mr. Justice McKenna was applied to the facts of that particular case, and did not promulgate a hard and fast rule of knowledge or notice, to be applied when, as said by Lord Mansfield in *Johnson v. Smith*, 2 Burr. 962, it would "work a wrong contrary to the real truth and substance of the thing". In short, the McCaskill case is grounded upon the proposition that notice to a member of a copartnership, or its authorized agent, of fraud tainting the title of lands which it acquires, follows the title when it passes to a corporation, a large majority of the capital stock of which is held by the members of

the copartnership, and precludes the corporation from claiming to be an innocent purchaser.

The pivotal point upon which the McCaskill case turned was the fact that those who owned the copartnership and those who owned the corporation were identical. That is not the case here; Holbrook had an interest adverse to Curtis and Collins and the company, and when that interest was purchased by the company the consideration paid him went to him individually, and neither the company nor Curtis and Collins had any interest in it. Such is the record. Reverse conditions prevailed in the McCaskill case; there the consideration paid by the corporation for the Ward lands passed to a copartnership composed of the stockholders holding the control of the stock of the purchasing company. In other words, the McCaskills sold to themselves.

In the cases at bar, in order "to protect the corporation" and those stockholders who, excluding Holbrook, held eighty per cent of the issued capital stock, we are contending for the very thing that the McCaskill case declares to be permissible and proper, namely, the enforcement of the presumption that the knowledge of Holbrook was not the knowledge of the company by reason of his adverse interests. It is not a case of invoking the presumption so "as to enable the corporation (or Curtis and Collins) to become a means of fraud, or a means to evade its (or their) responsibilities".

If you apply the test prescribed by the McCaskill case to these appeals, and look "beyond the cor-

poration formed, to the purpose of it and the officers who are identified with that purpose" it will stand the most exacting examination, it will be found that its purposes were proper and are fully and clearly set forth in its articles of incorporation (R. p, 1182), and that there were absolutely none other, either in enforcement or practice. Likewise, if you "look to the officers" who were then identified with it, no different result follows. The Government does not point to a single act of any of the officers of the company, including Mr. Holbrook, indicating that it was formed to take these lands over so as to throw the Government and its officers off the scent of anything done by any of its incorporators, or indicating that the company was used as a blind to conceal or discourage investigation of any of its acts. The record demonstrates the utter absurdity of any such claim.

In the first place Curtis and Collins, and the Master indicates, possibly Holbrook himself, were not aware of anything wrong in the steps taken by the entrymen in connection with their entries that would invalidate them. In the second place, T. D. Collins was strongly opposed to incorporation (R. p. 931), and this attitude hardly reflects a corrupt and ulterior motive upon his part. And again, the corporation primarily was not formed, and that is a very important circumstance, for the purpose of taking over the lands, the title to which takes its source in timber and stone entries, titles of that character were not then thought of or in

contemplation. The agreement of December 19, 1901, which was made long before Holbrook suggested that they accept titles based upon timber and stone entries, provided for the creation and organization of the corporation. This agreement reads:

> "The said parties of the second part (Curtis and Collins) agreed when the said party of the first part (Holbrook) shall have obtained forty-two thousand three hundred and eighty (42,380) acres of Forest Reserve, and have had the same deeded to the said trustee as herein provided, or shall have secured the title to forty two thousand three hundred and eighty (42,380) acres of timber lands in Plumas and Tehama Counties by having Forest Reserve deeded to said trustee, or otherwise procured the title thereto, or sooner if the parties to this agreement consent thereto, to form and organize a corporation under the laws of the State of California, having for its purposes, among other things, the purchasing and acquiring of said and other timber lands and (R. p. 1279) cutting the timber thereon, and manufacturing it into lumber or other articles of commercial value, and selling the same.
>
> "That the said corporation shall have a capital stock of five hundred thousand ($500.000.00) dollars, divided into 5000 shares, having a par value of one hundred ($100.00) dollars each" (R. p. 1280).

FAILURE TO RECORD DEEDS.

If it is claimed that withholding from the records the deeds to Gregory and from him to the com-

pany was a circumstance so far-reaching that it would indicate or hint that the corporation was organized for improper purposes, then, in addition to what we have already said upon that branch of the case, we reaffirm there is no evidence in the record that Curtis and Collins knew of, or directed, such withholding. Moreover, the fact that the deeds were not recorded as rapidly as they might have been is as consistent with innocence as guilt, and

> "There is no rule of law better established than where, from a given set of facts, two opposite inferences may be drawn, that inference will be adopted which is lawful and honest, and not that which is unlawful and dishonest".
>
> *(U. S. v. Detroit Timber & Lumber Co.,* 124 Fed. 393.)

In the cases at bar the lower Court found that Charles H. Holbrook owned from 900 to 1000 (probably not more than 900) shares of the capital stock of the corporation out of a total issue of more than 5000 shares, the balance resting in the ownership of the Collinses and the Curtises, who had no notice or knowledge of the alleged frauds, all of which demonstrates that the cases at bar fall far short of the situation existing in the McCaskill case and underlying the judgment therein, to wit, that a large majority of the stock was owned by persons having notice of the fraud permeating the title.

It is material, and we think underlying it is a principle, which amounts to a corollary, that in all the cases in which the exception alluded to in the

McCaskill case, and recognized by the courts, has been applied, the persons having the knowledge of the imperfections in the title acquired by the corporation, which knowledge was held to be fastened upon such corporation, owned *at least* more than a majority of all the issued or subscribed capital stock. In the McCaskill case it was a "large majority",—how large not appearing; in the Linn & Lane case, all but sufficient shares to qualify directors; in *Wilson Coal Co. v. U. S.*, 188 Fed. 545, the same; and in *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, all. We have not come in contact with a case applying the rule where the stockholder having knowledge of the tainted title and his interests being adverse to the company, held, as Holbrook did, a minority of the issued and subscribed stock, and the reason for that is at once apparent, namely, instead of effecting justice, it would work an injustice; in such a situation, a balancing of the equities would move the conscience of the chancellor to favor the innocent.

In the instant case Holbrook, who it is claimed had notice, actual, if he knew of the entrymen's frauds, which is doubtful, but constructive by reason of his partnership with Tuman, who at most had constructive notice, never owned, including the stock of C. H. Holbrook, Jr., his son, *twenty per cent* of the issued and subscribed stock (R. p. 1062). But, assuming that Holbrook owned between 900 and 1000 shares, and that the total issued and subscribed stock was at least 5000 shares, which the

record indicates (the absence of certainty being due to the destruction of the records in the San Francisco fire in 1906), then he owned eighty per cent less than all of the stock, thirty per cent less than half of the stock, and five per cent less than a quarter of the stock, his holdings were far short of a majority. Is it not clear that it would be drastic to invoke the rule in these cases? The land involved in this and the other appeals, approximately 3750 acres, which at fifty dollars per acre (the value proven by the Government) amounts to $187,500, so that, commercially, the application here of the rule followed in the McCaskill case, would mean a loss to the innocent and blameless of $150,000.

It is no answer to say that while the lands may be worth fifty dollars per acre they did not cost the company to exceed ten dollars per acre plus taxes. No one will deny that Curtis and Collins and the company are entitled to the fair and legitimate gains of their venture, honestly taken and fairly conducted.

It seems to us that there is a well-founded and logical distinction, based upon equitable considerations, between the relations and obligations and the effect upon the corporation of knowledge of a stockholder, even though he is an officer, who becomes such stockholder because essential to do so in order to consummate a deal profitable to himself, the dominant object of which is to acquire as much ready cash as possible, and a stockholder who finances the

enterprise and takes stock because of its attractiveness as an investment. In the former it is a case of accepting the stock as a "means to an end", and the law will not presume that such a stockholder will disclose any knowledge, actual or constructive, or impart to the company any information which will defeat that end or endanger the chances of its successful consummation. Holbrook was a stockholder of the prior class, as subsequent events demonstrated. He did not acquire his stock because he wanted it, but because he was compelled to do so in order to "put over" the deal. It is significant that he sold his stock soon after it was acquired; indeed it is in evidence that Holbrook, early and unknown to Collins, entered into negotiations to sell the control of the company to T. B. Walker, another timber man (R. p. 511). In other words, his whole scheme, his controlling purpose, was one of profit to himself, and he never lost sight of the goal. Such being the situation, the law will hardly declare that the corporation or Curtis and Collins were bound by Holbrook's knowledge of the wrong, assuming he had it, which he suppressed and concealed, when to do so would mean a heavy loss to those who were both ignorant and innocent of the wrong, and whose conduct in connection with the transactions involved is without taint or blemish.

A copy of the opinion rendered by the learned Judge of the trial Court is found in the Record (p. 400 et seq.).

We close this discussion with the following quotation from such opinion:

> "It is urged that certain of the findings of the Master on the question of fraud in the inception of the title of the entrymen are without support in the evidence. But aside from the view, as above expressed, that this contention is without merit, these considerations become immaterial in view of the fact that the Master found in each case that the (R. p. 403) Curtis, Collins & Holbrook Company was an innocent purchaser for value of the particular parcel of land involved.
>
> Not only was there ample evidence to sustain this latter finding, but a careful consideration of the Master's report in all its aspects satisfies me that his conclusion that the title of the present holder of these lands is unassailable is amply sustained by the principles announced in United States v. Detroit Timber etc. Co., 200 U. S. 321; United States v. Clark, id. 601; and many cases that could be cited from the other federal courts.
>
> As to the objection that the defense or plea of *bona fide* purchaser is insufficiently framed, there having been no exception or objection interposed thereto prior to the hearing, it is now too late to be availed of. People's Bank v. Gilson, 161 Fed. 286; Adam v. Norris, 103 U. S. 591. The defense is clearly sufficient in general outline, and the objection now made, that the amount of consideration paid for the land should have been stated, is a feature which should have been called to defendant's attention before submission of the case on the evidence. Moreover, I regard the proof as fully sustaining the requirements of the rule in its strictest application" (R. p. 404).

It is respectfully submitted that the decree of the District Court was right, and that the order of the Circuit Court of Appeals reversing it was wrong and should be reversed.

Dated, San Francisco,
March 1, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

CURTIS, COLLINS AND HOLBROOK COMPANY, appellant,
v.
THE UNITED STATES OF AMERICA AND Twenty-three Other Cases (342 to 364). } No. 341.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are twenty-four suits by the United States to cancel patents for lands in the Susanville land district, California, charged to have been fraudulently obtained in violation of the restrictive provisions of the timber and stone laws. The persons who made the entries were made defendants, together with the Curtis, Collins and Holbrook Company, the present holder of the legal title. There were originally other defendants, but as they have either filed disclaimers or are shown to have no interest in the matter, no further consideration need be given them.

The allegations of fraud in the different bills are substantially the same, and reference therefore will be made only to the bill in the leading case of *United States* v. *Cooksey et al.* The bill alleges that the application and sworn statement of the entryman was false in that he swore that he was applying for the land for his own benefit, whereas he had, before making his application, agreed to convey the land to the Curtis, Collins and Holbrook Company, and that the company knew of the fraud alleged and had procured Cooksey to make the entry for its benefit. (R. 6.) Both Cooksey and the company filed answers denying the allegations of fraud, and the latter also attempted to set up the defense of bona fide purchaser. (R. 24–29.) In some of the cases the entrymen did not answer the bills.

On motion of the government and with the consent of the defendants the cases were referred to a master to take the testimony and report his findings of facts and conclusions of law. (R. 39–40). It should be stated here for the information of the court, that originally there were 79 of these cases (R. 40–42), and as they were consolidated for hearing a large volume of testimony was taken, covering more than 3,500 pages. In 55 of the cases the master found that there was no fraud and recommended that the bills be dismissed. In these twenty-four cases, however, he found that the entries had been made under prior illegal agreements between the entrymen and one George E. Tuman; but the master concluded that the Curtis, Collins and Holbrook Company had

no notice of the fraud and sustained the defense of innocent purchaser, and in these cases also he recommended that the bills be dismissed.

In several of the cases in which the question of the statute of limitations was raised, the bills were amended to show that the government had no notice of the fraud until the year 1910, when the bills were filed, and that the fraud was concealed by affirmative acts of the defendants. Upon this question the master found that the government had no notice of the fraud until within six years prior to the filing of the bills (R. 270), and that the defendants withheld their deeds from record to avoid bringing the government's attention to the fact that so large a number of entries had passed into a single ownership (R. 263).

The master's reports were approved by the District Court (R. 400), in a brief memorandum opinion, and decrees were entered dismissing all the bills (R. 406). In these twenty-four cases in which the master found that the entries were made under prior illegal agreements, the government sued out appeals to the Circuit Court of Appeals.

As the evidence in all the cases was taken at the same time, a statement of the evidence was incorporated in the record on appeal in the *Cooksey* case only, there being a stipulation in each of the other cases to the effect that the statement of evidence and record in the *Cooksey* case might be used as the record in the other cases. A further reason for

this stipulation exists in the fact that the master made a full and comprehensive report in the *Cooksey* case only, reference to which is made in his reports in all the other cases, all of which are quite brief and in which his findings are only summarized. References to the record herein relate to the record in the *Cooksey* case, No. 341.

The Circuit Court of Appeals, in a well considered opinion in the *Cooksey* case, 275 Fed. 670, reversed the action of the District Court and ordered the patent cancelled. (R. 1392.) In the other twenty-three cases a single opinion was rendered, based on the decision in the *Cooksey* case, and in these cases also the action of the District Court was reversed and the causes remanded, with instructions that the patents be cancelled. (R. 1410.) The further appeals of the Curtis, Collins and Holbrook Company bring the cases before this court.

With this general statement we shall proceed to consider the facts common to all the cases, after which we shall briefly summarize the facts relating to each particular case.

Facts common to all the cases.

In the year 1901, George E. Tuman, a timber cruiser who had located and cruised some 4,200 acres of valuable public timber lands in Plumas and Tehama counties, California, desired to find some one who would furnish the necessary money to buy forest reserve scrip with which the lands could be acquired from the government (R. 416), and with this end

in view he sought C. H. Holbrook, Sr., whom he had previously known in Dunsmuir (R. 418). As the court is informed, under an act passed by Congress in 1897 (34 Stat. 36), persons owning lands within the limits of national forests might reconvey them to the United States and select in lieu other lands of equal area outside of the national forests without regard to the relative value of the lands. Consequently, one desiring to acquire title to public lands not included within the limits of any national forest could do so by purchasing privately-owned lands within the limits of national forests and exchanging them for the lands which he desired to select. Holbrook, when approached by Tuman, did not have the necessary money, but had operated considerably in timber lands, and he made a trip east in an effort to secure capital, taking with him one Golden who had been associated with Tuman in making the cruise. (R. 415.) The trip was unsuccessful, and later in the year Holbrook made another trip east, going as far as Pennsylvania, where he met D. G. Curtis, who introduced him to J. G. Curtis and T. D. Collins, men of means, who agreed to finance the proposition.

The parties entered into a contract, offered in evidence as defendant's Exhibit B (R. 1275), the purport of which may be substantially stated as follows: Holbrook agreed to sell to Curtis and Collins 42,380 acres of timber land in Plumas and Tehama counties, and to have the title in them "as in the manner hereinafter set forth," for the sum of $7.50 per acre, "making an aggregate or total cost of the whole of

said land to said parties of the second part, less Two thousand two hundred and fifty dollars ($2,250.00) interest, the sum of Three hundred and fifteen thousand six hundred dollars ($315,600.00)."

Holbrook was to secure the title to 42,380 acres of forest reserve land, for which he was to receive from the government a like quantity of the timber lands, the title to which was to be secured to Curtis and Collins in the following manner: The forest reserve lands would be deeded to one G. Howard Thompson, Trustee, to be held by him in trust in accordance with the terms of the agreement. Curtis and Collins would deposit in the Bank of California at San Francisco the sum of $200,000, which was to be used in purchasing forest reserve land at not exceeding $5.00 per acre. Payments were to be made by the bank to the owner of the forest reserve lands upon proper certificate of an attorney; and the trustee, upon the written request of Holbrook, was to deed the forest reserve lands to the United States and to make application for the timber lands, a list of which was annexed to the agreement; and when title had been acquired to the timber lands and upon notice from Holbrook that he had been fully paid, the trustee was to convey to Curtis and Collins, their heirs or assigns, or to "any persons or corporation they may in writing jointly direct."

The contract further provided that when title had been acquired to the 42,380 acres of timber lands, either by means of forest reserve base, or otherwise, Holbrook should be paid the balance of the purchase

price, $115,600, as follows: he would be given 789 shares of the stock of the corporation to be formed, from $5,000 to $10,000 in cash, and the balance in promissory notes of Curtis and Collins; but in the event that Curtis and Collins found it necessary to advance more than $200,000 to purchase the forest reserve lands, the amount of the promissory notes was to be reduced in the amount of such excess.

It will be observed that this contract had to do chiefly with the acquisition of lands by means of forest reserve base, but it becomes important here as showing the relation of the parties when they agreed and undertook to acquire lands under the timber and stone laws.

This contract plainly shows that the lands were to cost Curtis and Collins only the $200,000 which they were to deposit in the bank, plus the $5,000 to $10,000 in cash they were to pay Holbrook, and such notes as they might give him, which in no event would exceed $31,700, because Holbrook was compelled to take $78,900 in the stock of the corporation. It also shows beyond question that Thompson, the trustee, was to deed the lands to the corporation because Holbrook was to be paid the greater part of his profit in stock of the corporation.

After the second trip east it seems that Holbrook and Tuman bought out Golden, paying him $3,000 for his interest (R. 419), and thereafter he had no further connection with the matter.

About the time the title had been secured to the 42,380 acres of land, as provided in the contract, by

means of the forest reserve lieu lands, it became very difficult to obtain forest reserve scrip, as it was called (R. 476), and Holbrook suggested that there were other valuable public lands, title to which could be secured under the timber and stone laws. He asked Curtis and Collins whether that would be satisfactory. They replied that it would be, provided only that good title was obtained. About this time Holbrook further suggested that he should be paid $10.00 instead of $7.50 per acre, and this also was agreed to. (R. 925.) Pursuant to this supplemental oral agreement, title was acquired under the timber and stone laws to some 30,000 acres, including the lands involved in these suits.

It should be stated here that while the contract with Curtis and Collins was made in Holbrook's name alone, Tuman testified, and in this he is not contradicted, that he had an equal interest with Holbrook, who gave as his reasons for taking the contract in his own name, that when he found Curtis and Collins ready to sign it he did not wish to miss the opportunity, and so acted as though he were alone. (R. 496.)

The timber and stone entries were made through emissaries or agents of Tuman, to whom he gave the descriptions of lands he was willing to buy. (R. 428.) Among these agents were John H. Heppe, John E. Remick, and John W. Aid. (R. 428, 429, 521.) Heppe, who was the first of these to act for Tuman, was told by the latter that money would be advanced if necessary to pay for the lands, and that the entrymen

could thereafter sell at a profit of $100 above all expenses (R. 1095), and that Heppe would receive a location fee of $25 for each claim that Tuman purchased (R. 1092). Heppe accordingly became quite active and told those whom he approached that they could make $100 above expenses by using their timber right, and that, if necessary, the expense money would be supplied. (R. 429, 430, 1104, *et seq.*)

John W. Aid was a teamster around Chico, who brought in a number of entrymen from that neighborhood. (R. 533.)

The operations of Heppe having become known, J. E. Remick went to Tuman in the spring of 1902 and told him of a certain body of land in Township 25, Range 10 East, and that he (Remick) had friends who would like to enter the same; that he understood that Heppe had been making a location fee of $25 (R. 1131), and that he (Remick) would like to locate his friends (R. 481). Tuman examined the lands and gave Remick a list that he would buy. (R. 481, 490, 1131.) He told Remick he would lend him money and would send it to him for that purpose, and he [redacted] should account for it. (R. 433, 434.) With the exception of the first two entrymen that he located, Remick did not tell them that they would receive $100 above all expenses, but he did mention it to Cooksey and Huntington, as it was necessary, as he said, to "start something." (R. 1137, 1155.)

The expenses of the entrymen were paid by Heppe, Aid, and Remick, wherever necessary, out of the money furnished by Tuman. The money for making

final proof was generally ready at the land office at the time the proof was made. It was given to the entrymen by Remick or his brother, L. C. Remick, or by Arthur Elam, a compass man in Tuman's employ. (R. 431, 1133.) Sometimes, but not always, a note was taken. This note was given in favor of Elam or one Lewis, a friend of Tuman and Holbrook, whose name was used for that purpose. In some cases the money was handed to the entrymen secretly in a room apart. (R. 531.) Sometimes it was left on the table and picked up by the entrymen with nothing being said. (R. 882, 906.) Tuman testified that he loaned money to all the entrymen except his mother, Henrietta Tuman, and John Vanornum. (R. 480, 531.) After entry the land was sold and the entrymen received $100 above all expenses. The deeds were taken in the name of one Charles E. Gregory, whom the entrymen did not know and whose name was used by Tuman and Holbrook for some purpose of their own.

Nearly all of the timber and stone entries were made in the last six months of the year 1902, one having been made in January and one in February of the year following, and very soon after entry the entrymen conveyed the land to Gregory, but none of these deeds was recorded prior to June, 1904. In every case except that of Henrietta Tuman, Gregory conveyed the lands to the company a year or more before the deeds were recorded. Gregory's deeds to the company were made at the instance of Charles H. Holbrook, Jr.,

who was associated with his father, Holbrook, Senior, in the business. Gregory did not know how many deeds he made or from what entrymen he had received titles. (R. 1173.) He merely allowed his name to be used as an accommodation to Holbrook. (R. 1057.) He was made a defendant in the suits but did not answer the bills. His testimony will be found in the record at pages 1170 to 1178.

The Curtis, Collins and Holbrook Company was organized August 14, 1902, the incorporators being J. G. Curtis and his son, D. G. Curtis, T. D. Collins and his son, E. S. Collins, Charles H. Holbrook and his son, Charles H., Jr., and Irving F. Moulton. (R. 1187.) Gregory conveyed to the company one of the tracts here involved on November 10, 1902, nine on December 2, 1902, thirteen in May, 1903, and the remaining one on October 15, 1904. None of these deeds was recorded, however, until October, 1909, when one was put on record; another in November, 1909, and the remaining 22 in 1910 and 1911. (R. 1275.)

T. D. Collins testified that the corporation was not formed at his suggestion as he was always opposed to corporations. On the other hand, we find it difficult to believe that the idea was originally Holbrook's, because when Collins stated that Holbrook should take an interest in the firm, as he expressed it, Holbrook demurred, saying he was a poor man and had to have money to pay his debts and on which to live. It was Collins's first suggestion that Holbrook put all his supposed profit of $2.00 an acre into the "firm,"

but he said that upon Holbrook's suggestion that was cut down a little and Holbrook took only $78,900 worth of stock. (R. 931, 932.) When the corporation was formed Holbrook became vice president and general manager. He was in fact the corporation so far as taking title to the lands was concerned, because everything was left in his hands. (R. 937.) To show that Holbrook was in fact the corporation it is sufficient to refer to the testimony of the younger Curtis, who was treasurer. He testified that Holbrook would draw checks of the company and he would sign them, but it was necessary to the validity of the check that Holbrook too should sign it. (R. 1224.) And Tuman, who had charge of affairs in the field, was very positive in his testimony that Holbrook Senior knew everything that was going on in the field, as he, Tuman, kept him fully informed. "Q. Did he know that you were loaning money to the entrymen to take up the land?—A. He certainly did." (R. 482.)

The government introduced in evidence an account kept by C. H. Holbrook with the Lassen County Bank at Susanville. Tuman was authorized to draw against this account. (R. 524.) The government also offered an account in the name of Collins and Holbrook in the Bank of California at San Francisco. (R. 1229.) The master rejected this last account as evidence against Collins, because it was not shown who Collins was. The signature by which the checks could be drawn was that of C. H. Holbrook, and the place of business was 120 Sutter Street, where Hol-

brook and the Curtis, Collins and Holbrook Company had offices.

That money was drawn from the Collins and Holbrook account in the San Francisco bank and placed to the credit of Holbrook in the Susanville bank is apparent from the following: On October 7, 1902, $1,728 was drawn from the San Francisco bank and three days later the same amount was deposited in the Susanville bank; October 27, $8,946 was taken out of the San Francisco bank and the same amount deposited in the Susanville bank on October 31; November 12, $6,500 was taken out of the San Francisco bank and that amount deposited two days later in the Susanville bank; December 1, $5,860 was withdrawn from the San Francisco bank and two days later $5,760 was deposited in the Lassen County Bank; and on December 17, $1,880 was taken out of the San Francisco bank and two days later that amount was deposited in the Lassen County Bank. (R. 1229, 1230, 1261, 1262.)

As stated, Tuman had authority to draw on the Lassen County Bank, and it is therefore obvious that the money was used to make payments for the entries, and the inference is fair that Holbrook was not furnishing the money alone, because the account from which it was taken was not in his name alone but in the name of Collins and Holbrook.

It is true that Collins and Curtis were residents of Pennsylvania. Nevertheless, all of them, fathers and sons, came to California soon after they entered into the contract with Holbrook, and young Curtis,

who was made treasurer of the company, was out there frequently, perhaps as many as six times during the year 1902. (R. 1022.) Moreover, all of them, including J. G. Curtis (R. 1020), went out and looked over the lands. Holbrook was in the party, and Tuman went with them to show them the timber. (R. 422.) Tuman claimed that he had an equal interest with Holbrook in the undertaking, but he had some trouble in making settlement, and finally found it necessary to sue Holbrook. (R. 424.) This suit was settled through the intervention of T. D. Collins, who induced Tuman to accept 200 shares of stock in the company and $10,000 in money. For the 200 shares of stock that Tuman was induced to accept Collins paid him $150,000, or $750 per share, which Collins himself says was twice what it was worth. Collins went west to negotiate this settlement and advised Tuman to accept it. (R. 594.) Tuman did not know whether Collins made the trip for that purpose or not. When it was observed that Collins paid Tuman for this stock after these suits were filed (R. 426), the payment by Collins of such a large sum of money to Tuman becomes very significant. T. D. Collins testified that he did not know how Tuman had acquired the 200 shares of stock. (R. 942.)

Collins assigned as his reason for paying such a high price for the stock that he understood an outsider named Durphy wanted to buy it. But why should Durphy want to buy stock in a holding company that paid no dividends but, on the contrary, was under expense; and how could it possibly hurt

Collins for Durphy to buy a minority interest in the company? The only thing in reason that suggests itself is that Collins desired to influence Tuman's testimony in the cases, making it as favorable as possible to the company.

Another fact to be noticed is that in 1904 and 1906 special agents of the General Land Office filed charges against some 12 or 13 entries not here involved, but in the same vicinity, alleging that the entries had been made in the interest of Tuman and Holbrook. The lands had been sold to the Curtis, Collins and Holbrook Company, and Tuman admitted that he had heard of the charges and discussed with Holbrook the advisability of defending against them in the Land Office, but no defense was made. (R. 568.) Tuman testified that he wished to defend the entries but Holbrook was opposed to it.

Tuman further testified that he had a talk about these lands with E. S. Collins in 1908, and with T. D. Collins later, but nothing was done about the matter. T. D. Collins admitted that he had heard that some of the lands were lost, but just let it go at that, as "lost is lost." (R. 939.) If, as Collins testified, a dollar meant as much to him as to anyone (R. 940), and as the master would have us believe Curtis and Collins were acting "at arms length" with Holbrook, why did they not demand a settlement on account of these lands?

T. D. Collins and J. G. Curtis and their sons were called as witnesses for the defendants. They

testified that they had no knowledge of the fraudulent character of the entries, but they admitted the knowledge of facts and circumstances which the government contends should have put them on inquiry.

The facts relating to each case.

For convenience there are here set forth the facts pertaining to the several entries involved.

The case of Edward L. Cooksey, No. 341.

Cooksey made entry on October 16, 1902. The land was shown to him by J. E. Remick, to whom he says he sold the land after proof. (R. 597.) Remick was the first man who spoke to him about making the entry (R. 599); told him he could sell the land and make $100 above expenses, and if necessary the money could be borrowed (R. 600). Cooksey did not have the money when the time came to make proof, and he gave a note for it to one Lewis (R. 601), Remick furnishing the money. When he made the deed he demanded a sufficient sum to amount to $100 above expenses. (R. 602–603.)

Referring to his talks with Remick, Cooksey testified that he had two conversations, and that:

> In the first conversation he simply approached me on the proposition and discussed the matter of paying my expenses, etc., and I told him that I would see him again. In the second conversation I told him that I would take up the land on those terms, provided I could borrow money to take up the timber land.

Q. That was the terms?

A. That is the idea. I did not have any talk with Mr. Remick at either conversation relative to who would purchase the land after I took it up. I did not know whom he was to sell the timber land to. He said he could find me a purchaser.

Q. Did you agree at that time to sell to that purchaser?

A. I did not make any—no, there was no binding agreement that I could understand at that time. He said he was certain he could find a purchaser and that is as far as it went. I took his word for it. (R. 606.)

Cooksey paid no money for the publication fee. Upon being recalled Cooksey was asked this question:

Q. Do you remember in your testimony before that you said that Mr. Remick came to you and made a proposition that if you took up some timber land there was $100 and expenses in it, and he did locate you on timber land; that was the general outline of the proposition?

A. Yes. (R. 608.)

As stated, Cooksey made entry October 16, 1902, and nine days later executed a deed conveying the land to Charles E. Gregory; but the deed was not recorded until September 10, 1904, which was about three months after patent issued. Gregory conveyed to the Curtis, Collins and Holbrook Company May 2, 1903, but the deed was not recorded until six or seven years thereafter. (R. 1272–1274.)

The case of John Huntington, No. 342.

Huntington's entry was made on the same day as Cooksey's, October 16, 1902, and he too was shown the land by Remick. (R. 609.) After proof he was given $100 by Remick. (R. 610.) Huntington testified that Remick told him that he could take up a piece of timber land and expect to get about $100 out of it (R. 611); that the first time Remick came to talk to him about the timber claim he asked whether Huntington had used his timber right, and told him he could make $100 by taking up a piece of land and selling it, and that he would advance or loan the money to pay the government. (R. 612.) At that time Huntington did not agree to accept the proposition but told Remick he would see him again. In a week or two he did see Remick again, and told him that he would take up the land. He expected to sell the land. All this took place before any examination was made of the land. He borrowed the money to pay the expenses from Remick. (R. 614.) He did not have money when the time came to make proof, but he expected to get it from Remick as Remick had told him he could do so. (R. 615.) After entry he sold the land and Remick gave him $100. It was clear profit. (R. 617.)

The following is taken from his testimony:

> Q. Did you take up this land just in accordance with this conversation that you first had with Mr. Remick?
>
> A. I think I did.

Q. Did you expect when you started out to take up this land to keep it for yourself at all?

A. No sir.

Q. What did you expect that you were going to do with the land?

A. I expected to sell it.

Q. Who did you expect to sell it to?

A. I expected to sell it to Mr. Remick, I think that was it.

Q. How much did you expect to get at the time you started out?

A. All told?

Q. Yes. How much did you expect to get at the time you started out?

A. I think it was the amount and expenses.

Q. The $100?

A. Yes.

Q. Anything else?

A. And expenses.

Q. All expenses?

A. Yes.

Q. That was in accordance with Mr. Remick's proposition to you, in accordance with his offer to you at the time he first came to you, Mr. Huntington, was it not?

A. I think it was. (R. 618, 619.)

When asked upon cross examination as to the talk he had with Mr. Remick, Huntington testified that he could not repeat just what was said, but he was to realize practically $100 out of it (R. 620); that Remick had promised to pay him that sum for the claim. When asked as to how he expected to return the money to Remick that he borrowed, Huntington answered that he expected to return the timber land (R. 623).

While Huntington's entry was made on October 16, 1902, and he executed a deed nine days thereafter conveying the land to Gregory, the deed was not recorded until about two years later, or three months after patent issued. Gregory executed a deed conveying the land to the Curtis, Collins and Holbrook Company May 2, 1903. This deed was not recorded until six or seven years thereafter. (R. 1272–1274.)

The case of Reuben J. Mitchell, No. 343.

This entryman testified that he did not see the land before he filed on it. (R. 645.) He was traveling through the mountains for his health and stopped at Susanville for the summer, and got a description of the land to be filed on from Jack Heppe. Heppe asked him if he wanted to take up some timber land, to which witness answered yes, and Heppe asked him about the money. Witness said that he had some money, but between then and the time he would need it he might lose it, playing poker, and asked whether he could borrow the money. (R. 646.) Heppe gave him the filing papers and told him to take them up to the land office and "say you want to file" on a piece of timber. (R. 647.) He made a filing and about 30 or 40 days thereafter was notified by the receiver of the land office that the land he had filed on had been proved up by someone else, and that he would have to file on another piece. That he waited around about two or three weeks when a man came in one night where he was playing

a game of billards and said, "Your name is Mitchell. I would like to see you a minute." They went over to a corner of the saloon and the man handed him the slip of paper. He seemed to be in a hurry and would not talk with him at all, but "flew right out." He introduced himself as Tuman. Witness did not recall positively whether the man introduced himself as Tuman or he asked someone else and was told his name was Tuman. At the time of making the entry he thought he would sell it and realize $100 in accordance with his conversation with Heppe (R. 648). Heppe gave him the money with which to make final proof, and after that he signed the paper and Heppe paid him $100 and expenses. (R. 653.) During the first conversation with Heppe in regard to the matter he was told he would probably get $100 by making the entry, and he expected to sell it for $100, and naturally supposed it would be either to Heppe or possibly some friend of his. He considered he was under obligation to Heppe to convey the land to him or some of his friends. (R. 653.) The substance of his talks with Heppe was that he understood he could make $100 if he would take up the land (R. 657).

Mitchell's entry was made November 18, 1902, and the same day he executed a deed conveying the land to Gregory, but the deed was not recorded until September 14, 1904. On May 2, 1903, Gregory conveyed the land to the Curtis, Collins and Holbrook Company, but that deed was not recorded until six or eight years thereafter. (R. 1272–1274.)

The case of Henrietta Tuman, No. 344.

This entrywoman is the mother of George E. Tuman. She testified that her son advised her to take up the timber claim in Plumas County. He took her out to the land in a buggy, and on the first trip when she filed on the land she paid nothing. When she did pay she paid it all at once. (R. 638.) She didn't remember what sum it really was. When she made final proof her husband took her in a buggy to Chico, and from there she went on a stage to Prattville, where she met her son. The money she paid the land office at the time she made the final proof was her own individual money (R. 639); she had it in a bank in Susanville. Her son got the money for her and took it to the hotel. She didn't sell the land herself as her son was attending to her business then, and she told him to do the best he could with it. She didn't remember how much she made out of the land. She never did know. She never asked her son what he got for the land because they were in business together and she "never did take up anything like that. I didn't ask him about it at all, just for him to do the best he could." (R. 639.) She had no recollection at all of executing a deed for the land. (R. 640.) Witness was asked this question:

> When did you first consider that you did not own the property any more, Mrs. Tuman?
>
> A. Well, I did not consider very much about it. It was in my son's hands to take care of, and I, of course, had other work to do that I did not feel like caring for it, and I asked him

if he would take care of it, and he said he would. He was doing all of our business, so, of course, I did not have to have any thought for it.

Q. At that time what was your son's business, Mrs. Tuman?

A. I suppose it was dealing in lands and mines and doing that kind of work, selling real estate, I believe. (R. 641.)

She testified further that in taking up the timber land she was in one sense following her son's advice. He told her it would be to her advantage to do it. She does not know what she made out of the transaction. (R. 641.) Had no idea, because their dealings were not that close. They were one family. When asked why she kept her money deposited in Susanville, in the bank over there, Mrs. Tuman answered her son had to have money there; she had money and thought it best she should have it there so he would not have to carry it. She never checked against the Susanville bank, as she had money in Red Bluff, and could get it there. The money in Susanville was really under direction of her son and in his name. Her son never told her where she could sell the land; he told her he could probably get a sale for it at any time after she had a deed for it. When the land was sold whatever money came in was just put into the same account. She took the land for the family's benefit and let her son do the rest of it. At the time of taking it up she did so with the idea of turning it over to him to take care of in the course of his timberland dealings. (R. 642, 643.)

Mrs. Tuman's entry was made September 20, 1902, and the land was conveyed to Gregory January 20, 1903, but the deed was not recorded until September 10, 1904. Gregory conveyed the land to the Curtis, Collins and Holbrook Company October 15, 1904, but this deed was not recorded until five or six years later. (R. 1272–1274.)

The case of Gertie Terrell, No. 345.

Before making entry this entrywoman, who at the time of the trial was Mrs. Luetkens, had a talk with John H. Heppe, who told her that if she would take up the land she would receive $100. She was not to keep the land when she took it up. In addition to the $100, she was to receive her expenses. (R. 628.) She told him that she would take up the land on those terms. She paid none of the expenses of the trip to make the filing; Heppe furnished the money to pay them. And on the trip to make final proof her expenses were paid. She did not pay them out of her own pocket. (R. 629.) She doesn't know where she got the $400 to pay for the final proof; she got it in Susanville; thinks she got it at the bank, but she did not have that much money in the bank in her own name. She did not use a cent of her own money in paying for the land. After making proof she disposed of the land to somebody; she doesn't remember whom. At the time of executing the deed she received $100. Heppe told her to go and make the deed and get her money, and she knew she was going to get this $100 for taking up the land, at least

he had told her she would. (R. 631). On cross-examination she testified, when asked by Heppe whether she would take up the land for $100 she told him she would, by which she meant to give him to understand that when she took it up she would let him or someone else have it for $100. (R. 632). After having that talk with him she felt she was under obligations to let him have it. She admitted that the statements made by her at the time of making final proof were false, but said she wanted the money. (R. 633.)

Mrs. Luetkens' entry was made September 3, 1902, and on September 11 she executed a deed conveying the land to Gregory, which deed was not recorded until two years thereafter, or more than three months after the issue of patent. Gregory conveyed the land to the Curtis, Collins, and Holbrook Company December 2, 1902, but the deed was not recorded until seven or eight years thereafter. (R. 1272–1274.)

The case of Rebecca H. Heppe, No. 346.

This entrywoman is the wife of John H. Heppe, one of Tuman's agents; she went with her husband to look at the land, knowing that some company was going to get it and she was to get $100. She had a conversation to that effect with her husband. At that time she did not have $400 to invest in timber land. (R. 634.) When she made the proof Mr. Heppe gave her the money for that purpose and she deeded the land to Mr. Tuman; that is, she signed a paper

for Mr. Tuman and he gave her $100. That was just as she understood it when she started out. (R. 635.) She says that she signed the deed for Mr. Tuman. He was present and gave her the money himself when she signed the deed. Her husband told her to take up the land and she was to get $100 for it. (R. 636, 637.)

Mrs. Heppe's entry was made September 8, 1902, and on September 16 she executed a deed conveying it to Charles E. Gregory. The deed was not recorded until two years thereafter, which was more than three months after the issue of patent. Gregory conveyed to the Curtis, Collins, and Holbrook Company December 2, 1902, but the deed was not recorded until some seven or eight years thereafter. (R. 1272–1274.)

The case of Jacob S. Aid, No. 347.

This entryman is the father of John W. Aid, one of the men who was paid by Tuman for assisting him in making the entries. Remick showed him the land. He went with his three sons, John W., Thomas L., and James D. Aid. John W. Aid paid the expenses. (R. 837, 848.) He was given the money to make final proof by Arthur Elam, who was representing some company. (R. 838.) Elam gave him the money in his room. (R. 840.) When he made the entry he expected to sell the land and get $100. This was what he was told by his son, John W. Aid, and by Remick also. (R. 839.) After proof he made a deed and was given $100 by Tuman. (R. 841.) This

money was handed to him in the cloakroom of the hotel. (R. 842.) At the time he took up the land he expected it to go to the man who furnished the money. (R. 846.) His son, John W., was the first one to speak to him about making an entry, saying he could make $100 by doing so. (R. 846.) He could not conscientiously sell to anyone but Tuman as he was under obligation to deed the land to him. (R. 857.) He would not have considered it honorable after Tuman had furnished the money. (R. 859.) The understanding he had was with his son, John W. Aid.

Mr. Aid's entry was made November 21, 1902, and the land was deeded to Gregory December 9, 1902, but the deed was not recorded until nearly two years later. Patent issued June 8, 1904. Gregory's deed to the company was dated May 2, 1903, but this latter deed was not recorded for six or eight years. (R. 1272–1274.)

The cases of Thomas L. Aid, No. 348, and James D. Aid, No. 360.

Both of these entrymen were deceased at the time of the trial. Jacob S. Aid, their father, testified that they had died, but that they were to take up land and receive $100 for their right (R. 843), and they received $100 from the same man he received it from. Remick talked to them all together at Taylorville about the matter. (R. 844.) Jacob S. Aid saw the money that his sons received; it was in twenty dollar gold pieces. (R. 848.) Neither one of the sons

had money of his own with which to make the entry. (R. 853.)

Both of these entries were made November 21, 1902, and the land was conveyed to Gregory December 9th, following, but the deeds were not recorded until two years later. Patents issued in 1904, and Gregory conveyed to the company May 2, 1903, but these latter deeds were not recorded for several years thereafter. (R. 1272–1274.)

The case of Henry Morley, No. 349.

This entryman made his filing without seeing the land. Heppe gave him the numbers of the land that he was to file on and went with him to the land office. (R. 657.) After making his final proof he went over to the hotel where he met Mr. Elam and they had a little talk together and went to the recorder's office where he signed a deed; went back to the hotel and turned it over to Elam, who gave him $100 and the expense money. He took up the timber land because one night when in Susanville Heppe went to him and asked him if he had ever used his timber right, and said, "Do you want to make $100," that if he wanted to take up a timber claim he could make $100, to which the witness replied that he was willing to do it but did not have the money. Heppe said that would be all right. (R. 658.) Elam gave him the money with which to pay the publication fee (R. 659), and the $400 with which to make payment on his final proof. When asked the question what he was to do to get the $100, witness answered: "Well, as near as I could figure it

out in my own mind, I was simply donating my timber claim for the price of one hundred bucks." He agreed to turn the land over to whomsoever Heppe might direct, because Heppe or his friends furnished the money. (R. 659.) He admitted making false answers to the final proof questions that had been asked him and says that he did it because that was the only way he could win through with the deal; that was the agreement and he was supposed to go through with it. (R. 661.) The witness was asked the question on cross-examination: "Did you get the impression that you should turn this land over to Mr. Heppe or someone he represented for the mere fact that he was loaning you the money?" to which he answered: "I certainly did. I considered it an agreement on my part". (R. 665.)

Morley's entry was made December 24, 1902. The land was conveyed to Gregory December 19th, 5 days prior to the issue of final certificate, but the deed was not recorded until two years thereafter, which was six months after the issue of patent. Gregory conveyed to the company May 2, 1903, and this deed was not recorded for 6 or 7 years thereafter. (R. 1272–1274.)

The case of Elijah Taylor, No. 350.

Remick showed him the land. He went with the Aids, John L. Gray, and Robert C. Taylor. (R. 862.) John W. Aid told him he could take up a piece of land and make $100. He was given $412 the day he made proof, notwithstanding which he used his

own money to pay for the land. (R. 866.) After entry he signed a deed and was given $100. (R. 867.) John W. Aid took him to the notary's office when he signed the deed. (R. 868.) When John Aid spoke about making the entry he said probably $100 would be made out of it, and Taylor took it up on that basis. (R. 876.)

Taylor's entry was made November 29, 1902, and on December 1st following he conveyed the land to Gregory, which deed was recorded September 14, 1904. Patent issued June 8, 1904. Gregory conveyed to the Company May 2, 1903, but the deed was not recorded until 5 or 6 years later. (R. 1272–1274.)

The case of Robt. C. Taylor, No. 351.

This is one of the entrymen to whom Tuman advanced money on John W. Aid's recommendation. He was shown the timber by Remick, Aid taking him to the land. (R. 878.) Aid told him that he could locate a timber claim, and a few days later they went to look at the land. (R. 879.) While in Susanville to make proof he got $412; it was lying on a table in a room at the hotel. (R. 882.) All of his expenses were paid. (R. 895.) After proof he sold the land for $100. He did not know who gave him the $100; it might have been Tuman. (R. 885.)

This entry was made November 29, 1902. On December 1, following, Taylor executed a deed conveying the land to Gregory, which deed was recorded September 23, 1904. Patent issued June 8, 1904, and Gregory conveyed to the company May 2, 1903.

This deed was not recorded until seven or eight years later. (R. 1272–1274.)

The case of Carrie M. Allen, No. 352.

This entrywoman is the wife of the defendant, Charles J. Allen. When she went to look at the land her husband went with her. She expected to sell the land for $100 when she took it up. She discussed it with her husband. (R. 764.) She did not expect to use her own money to take up the land; she thought the money was coming from some company that they were supposed to sell to. She knew nothing about how the expenses were paid on the trip. When making proof she paid the land office over $400. Her husband gave her the money, which he got through a check. She thought the check came from Mr. Heppe. After making proof she sold the land and got $100 for it. The land was deeded to Gregory, but she did no business with him personally. (R. 765.)

Entry was made October 3, 1902, and the land was deeded to Gregory October 14, 1902; the deed was recorded March 28, 1910; patent issued September 15, 1904. Gregory conveyed to the company December 2, 1902, but his deed was not recorded until six or eight years later. (R. 1272–1274.)

The case of Jas. D. Baker, No. 353.

When asked how he happened to make the entry, this entryman answered that Heppe came to him and told him there was a chance to make $100 by

turning the land over, and as a result of that conversation he took up the land. When he went to look at the land he was accompanied by Heppe. (R. 703.) He got the money to make proof from the Susanville bank. He had a mine that he had mortgaged to get the money for himself, his wife and daughters. (R. 704.) He thinks Mr. Tuman told him that he could get the money out of the bank in that way. After proving up he sold the land, deeding it over to Gregory, but delivered the deed to and talked with Tuman, at which time he received $100. Witness did not remember whether the mortgage had been recorded or not. (R. 705.) All his expenses were paid when he went out to look at the land. When they went to Susanville it was found there was something wrong with the descriptions of the land, and he had to go out and look at other land. On the next trip Elam showed him the land. (R. 709.) His patent was for only 80 acres, because there was a part of the land on Mount Lassen that did not amount to anything and it was cut off. Tuman, Heppe, or Elam told him to cut it off. The entryman was not personally interested in what was on the land, whether it was good timber or not. (R. 711.) When he sold his claim he received $100.

Upon cross-examination this witness said that Heppe introduced the subject, asking whether he wanted to take up some land, and saying, "You can take it up anywhere around; you can make $100 if you take up 160 acres," or something to that effect;

to which witness replied, "All right," by which he meant that he would take up the land and sell it for $100. (R. 713.) When asked how he came to give a mortgage on his mine to raise the money to make final proof, witness answered:

> Well, it was a kind of bogus mortgage, I guess.
>
> Q. That was the real purpose of it, was it not?
>
> A. Yes.
>
> Q. To conceal something?
>
> A. Yes. * * *
>
> Q. What makes you say that was a bogus mortgage?
>
> A. Well, because I know it was.
>
> Q. Well, then, why? Just tell us why that was a bogus mortgage.
>
> A. Well, I suppose it was for cloaking things over.
>
> Q. You knew that when you made it, did you?
>
> A. I think so. (R. 718.)

When asked as to whom he had promised to sell the land he answered, "Tuman."

> Q. When had you made that promise?
>
> A. Well, it was not a promise, only an agreement that Heppe and I had.
>
> Q. That was the agreement that took place before you went to look at the land?
>
> A. I think so. (R. 723.)

Baker's entry was made August 23, 1902, and two days later he conveyed the land to Gregory, the deed

being recorded September 10, 1904, nearly two months after patent issued. Gregory conveyed to the company December 2, 1902, but this deed was not recorded for a number of years thereafter. (R. 1272–1274.)

The case of Mayme H. Baker, No. 354.

This entrywoman at the time of the trial was Mrs. Mayme H. Thompson; she testified that when she filed on the land in June, 1902, she was staying with her father, James D. Baker. Mr. Heppe showed her the land. She had no conversation with anyone except her father. He told her if she took up the land she could get $100 for it. She was not to keep the land after taking it up. She was to turn it over to someone and get $100. (R. 732.) On the various trips that she made in regard to the matter she paid no money out on account of expenses; she doesn't know where the money came from. The $400 with which to pay for the land was given her by her father. She doesn't know where he got it. After making proof she signed a deed conveying the land, at which time she received $100, just as she expected when she started out. (R. 733–734.)

This entry was made July 30, 1902, and the land was conveyed to Gregory September 6, 1902, but the deed was not recorded until November 12, 1904, several months after patent issued. Gregory conveyed to the company December 2, 1902, but his deed was not recorded for a number of years thereafter. (R. 1272–1274.)

The case of John L. Gray, No. 355.

Remick showed this entryman the land. (R. 903.) When he filed his expenses were paid. He did not have $400 to pay for the land and expected it from some other source. He did not expect to keep the land; he expected to sell it. (R. 905.) He expected the money to be furnished; otherwise he would not have gone on with it. He got the $400 to pay for the land at Susanville in a room at the hotel. The party in the room disappeared and he was left alone and the money was lying on the table. (R. 906.) After proof he made a deed but does not know to whom he gave it. At that time he received $100. (R. 911.) At the time of taking up the land he expected to sell it as soon as he got his title. He would not have used his own money to make the entry. (R. 912.)

Gray's entry was made November 29, 1902, and the land was deeded to Gregory December 1, following, but the deed was not recorded until 1909. Patent issued on April 17, 1905. In the meantime Gregory had, on May 2, 1903, conveyed to the company, but this deed was not recorded until 1910 or 1911. (R. 1272–1274.)

The case of Margaret J. Baker, No. 356.

At the time of the trial this entrywoman was Mrs. Margaret J. Stover, and she testified as follows: That she was living with her father in June, 1902, when she made her filing. The land was shown to her by Mr. Heppe. She had a conversation with her father, James D. Baker, before making the

filing. He said that she could take up the land and get $100 for it, to which she replied that she would. (R. 737.) She was to sell the land after entering it. She doesn't know to whom it was sold, but she executed a deed for it. (R. 738.) She knew the land was to be sold when she made the entry. Her father was to attend to it, and she knew her father was to sell it but didn't know to whom it was to go. (R. 740.) She was to get $100 for taking up the land and selling it, that is, deeding it away. (R. 741–742.) She admitted making false answers to the questions asked her on final proof.

This entry was made August 29, 1902, and the land was conveyed to Gregory on the 6th of the following month, but the deed was not recorded until April 18, 1910, several years after patent issued. Gregory conveyed to the company December 2, 1902, but the deed was not recorded until six or eight years later. (R. 1272–1274.)

The case of M. J. Self, No. 357.

This entryman testified that he was employed on the election when Heppe came to him saying he had a piece of land left and wanted to know whether he would take it, to which witness replied that he needed some money pretty badly and guessed he would. (R. 666.) Heppe said there was $100 in it. "What were you to do to get the $100? A. Expected to deed the land over." (R. 667.) Witness paid his own expenses at the time of making final proof, as he was summoned to Quincy on a jury, but Tuman

repaid him. (R. 667.) Elam gave him the $400 with which to pay for the land. A 40-acre tract of the land he entered had been previously entered, and the $100 paid for that was left in the land office. He was told he could draw the money, but thought he might be taking a risk by doing so and left it. (R. 668, 671.) Tuman testified that he and Holbrook got this money. (R. 588.) At the time he started out witness did not tell Heppe that he would deed the land over. In answer to a question regarding that he said: "No. I did not tell him anything about deeding the land at all. There was nothing said about deeding the land over, only what I say, he said there was $100 in it, and of course I knew what it was * * *. I did not expect to keep the land when I started out. I expected to deed it over." (R. 669). After proof he deeded the land to Tuman, the deed being drawn in favor of Gregory, and witness received $130, which included his expenses. (R. 668.)

Self's entry was made February 6, 1903, and he conveyed the land to Gregory March 7, 1903, but the deed was not recorded until May 23, 1905. Gregory conveyed the land to the company May 2, 1903, but the deed was not recorded for five or six years thereafter. (R. 1272–1274.)

The case of John Vanornum, No. 358.

This entryman testified that before making his filing he had a talk with John W. Aid, who told him that he could go up to Plumas, buy land and sell it,

and get $100. He accordingly went up to Plumas to look at the land, on which trip all his expenses were paid. (R. 917.) On the two trips to Marysville when he made entry all his expenses were likewise paid. When he made proof at Marysville he got his receipt, which he turned over to Aid when he deeded him the land. Aid brought him the money with which to make proof. (R. 916.) At the time he deeded the land he received $100. (R. 918.) He felt he was obliged to deed the land to Aid or someone he might designate. (R. 919.)

This entry was made January 26, 1903, and on February 24, 1903, he deeded the land to Gregory, the deed being recorded October 29, 1904, a little more than a month after patent issued. Gregory's deed to the company was dated May 2, 1903, but it was not recorded for several years thereafter. (R. 1272–1274.)

The case of Geo. D. Gardenhire, No. 359.

William J. Gardenhire, the son of this entryman, testified that his father took a piece of timber land at the same time he did. At first he said he did not know whether the same proposition was made to his father as had been made to him, but he did not think his father had sufficient funds to make the entry. His father told him that Heppe had made the same proposition as had been made to the son, namely, that he could make $100 by taking up a timber claim and that his expenses would be paid. The father said he intended to accept the proposition. (R. 697–698.)

This entry was made September 22, 1902, and five days later the land was conveyed to Gregory, but the deed was not recorded until March 8, 1911. Patent issued December 30, 1904. Gregory conveyed to the company December 2, 1902, but the deed was withheld from record for six or seven years. (R. 1272–1274.)

The case of John W. Aid, No. 361.

This entryman was one of those to whom Tuman gave descriptions of timber lands and said that if people wanted to take them up and did not have the money it might be arranged for them (R. 429), and they could probably make $100 out of the transaction (R. 430). Tuman loaned Aid the money for the purpose of getting his land and "hoped" that he would acquire it. (R. 431.)

Aid testified that Remick went with him to look at the land, Aid's father and two brothers being in the party. Before he went to look at the land he had a talk with Tuman, from whom he got money to "carry me through." (R. 767.) Tuman told him that he would loan money to those who wanted to take up land. Later on he made arrangements whereby he was to receive four dollars a day for his team to take people to see the lands. (R. 770.) A location fee of $25 was to be paid Remick, which Tuman was to pay, "that was a part of the arrangement." (R. 771). When he proved up he got the money from Tuman. He met Tuman at Chico after making proof (R. 774) and gave a deed to the land,

for which he received $100. Tuman furnished money through him for a number of men whom he had never met (R. 777), among them Elijah Taylor, Robert C. Taylor, and John L. Gray. Jacob S. Aid, the father of this entryman, testified that he made an entry under an understanding with his son that someone would provide the money, and that he would receive $100 for deeding the land. (R. 846.)

This entry was made November 21, 1902, and the land was conveyed to Gregory December 9, following, the deed being recorded February 25, 1911. Patent issued May 1, 1906. Gregory conveyed the land to the Company May 2, 1903, but the deed was not recorded until six or seven years later. (R. 1272–1274.)

The case of Chas. J. Allen, No. 362.

This entryman testified that Heppe wrote him a note telling him there was some land to be taken up. He had heard a lot about land being taken up for some company for $100, but he didn't know what company it was, only that Tuman was the agent for it. He doesn't know how Heppe happened to write to him. When he took up the land, he expected to turn it over to the company that Tumam and Heppe were agents for, and he expected to get $100 clear; did not expect to use his own money with which to prove up. (R. 752.) He and his wife made proof at the same time. Heppe gave him a check with which to pay the land office. The check was for $1,600 at least. Heppe instructed him to give

$800 or something like that to two men who would be there. He thinks the check was signed by Tuman, but it was on Holbrook, and he cashed it at the bank. He is sure the check was signed by Tuman, but it was a check on the bank. Of the $800 retained after paying the two men $800 out of the check, he used part to pay for his own land and the other $400 he gave to his wife. He did not give any note for this money at all. He felt that he was under obligation by taking this money which he was to discharge by taking up the land and turning it over to Heppe. (R. 754.) After proof he signed a deed in favor of Gregory. He did no business with Gregory, just signed the deed to him which he handed to Tuman or Heppe. At that time he was given $100 and at the same time his wife was given $100. His expenses were paid. Upon cross-examination witness said that he took up this land to get the benefit of the $100. (R. 756.) He admitted making false answers to the questions asked him at the time of final proof, but says he did that because he thought he had to do it to get the land. He didn't know what he was getting into when he first started out, but after getting started he went through with it. (R. 760.)

Allen's entry was made October 3, 1902, and the land was conveyed to Gregory October 14, 1902, and the deed was recorded March 28, 1910. Patent was issued January 19, 1905. Gregory deeded the land to the company as early as November 10, 1902, but this deed was not recorded for six or eight years thereafter. (R. 1272–1274.)

The case of Chas. J. Monroe, No. 363.

This entryman was shown the land by Jack Heppe. (R. 677.) He testified that the way he happened to take up the land was as follows: One day Heppe came to him and wanted to know if he didn't want to make $100 easier than working for it, to which witness answered "yes," and he was told how he could make it. He could do so by going and locating on some land. Witness replied that he didn't want to pay out any money to file on land, and Heppe said the money would be handed to him. He took Heppe's advice and set out for filing on the land. At that time Heppe told him there would be a purchaser there and the land could be disposed of as soon as proof was made and witness would get $100. (R. 678–679.) On going to make his filing and his final proof his expenses were paid by Heppe. (R. 680.) The money to pay for the final proof was given him by Tuman at the Emerson Hotel in Susanville, and the day after Tuman brought him back to Prattville with a notary public, where he transferred the papers to him and received $100. (R. 681). When Heppe told him there would be a purchaser there as soon as he proved up, he said that would be all right. (R. 686.) He admitted that he had testified falsely at the time of making final proof and said one answer given was at the suggestion of Heppe. (R. 688–690.)

This entry was made September 20, 1902, and two days later the land was deeded to Gregory, but the deed was not recorded until March 8, 1911, which was

nearly five years after patent. Gregory conveyed the land to the company December 2, 1902, but this deed was not recorded until seven or eight years later. (R. 1272–1274.)

The case of Wm. J. Gardenhire, No. 364.

This entryman went with a party of four to examine the lands. The party included his father, George D. Gardenhire, Elam drove the team and Heppe was along. (R. 694.) The day after making proof he signed the deed transferring the land, and got $100. The entry was made through Heppe, who said there was a chance to make a piece of money, $100 and expenses, by going out and taking up the land. The land was to be turned over. When Heppe first spoke to him in regard to the matter he said there would be $100 in it and expenses (R. 695) and witness said he would do it. He could not have made the entry if it had not been for Heppe's proposition, because he did not have the money. He felt obligated and bound to sell the property to anyone that Heppe might indicate (R. 700), and if another buyer had come along he could not have sold because he was taking up the land for the benefit of Heppe (R. 701).

This entry was made September 20, 1902, and the land was transferred to Gregory on September 26th, but the deed was not recorded until April 18, 1910, which was six years after patent issued. Gregory conveyed to the company December 2, 1902, but his deed was not recorded until a number of years later. (R. 1272–1274.)

As stated, the master found that in each of the cases there was a prior agreement by the entrymen to convey the lands to Tuman or someone whom he might designate, but he concluded that the Curtis, Collins and Holbrook Company had no notice of the fraud and was a bona fide purchaser for value.

STATEMENT OF THE ARGUMENT.

I. The master having found that the entries were made under a prior agreement to sell the land, his finding will not be disturbed unless clearly erroneous.

II. The defense of bona fide purchaser is an affirmative defense which must be set up and established by the defendants, and it has not been established in this case.

(a) A purchaser who fails to exercise due caution will not be protected.

III. The facts found by the master show affirmatively that the Curtis, Collins and Holbrook Company had notice of the fraud by which the patents were obtained from the government.

ARGUMENT.

I.

The master having found that the entries were made under a prior agreement to sell the land, his finding will not be disturbed unless clearly erroneous.

The rule upon which this proposition is based is so well settled that we do not feel justified in devoting much time to its consideration. It is clearly laid

down by this court in *Davis* v. *Schwartz*, 155 U. S. 631, where the reference was made to a master, with consent of the parties, "to hear said causes and report to this court his findings of fact and conclusions of law." In considering the question, Mr. Justice Brown, who delivered the opinion of the court, said (p. 637):

> Where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court * * *. As the reference in this case was by consent to find the facts, we think the rule in *Kimberly* v. *Arms* [129 U. S. 512] applies, and as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive.

There is abundant evidence to support the finding of the master that these entries were made under prior illegal agreements. Tuman's manner of proceeding, to say nothing of the direct testimony of the entrymen themselves, shows that there was clearly an agreement to convey the land made prior to the filing of the applications. Upon this question we now have the concurrent findings of the two lower courts. *Texas & Pacific Ry. Co.* v. *Railroad Commission of Louisiana*, 232 U. S. 338.

II.

The defense of bona fide purchaser is an affirmative defense which must be set up and established by the defendants, and it has not been established in this case.

This has long been the rule of the federal courts. It was laid down as early as 1836, in *Boone* v. *Chiles*, 10 Pet. 177, and was recently affirmed and adhered to in *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397. While some of the decisions of this court, such as *United States* v. *Clark*, 200 U. S. 601, may contain observations indicating a contrary view, the more recent decision in the *Wright-Blodgett* cases shows conclusively that the court has no intention of departing from the rule laid down in *Boone* v. *Chiles*, which is quoted in *Wright-Blodgett* as follows (p. 403):

> But this is an affirmative defense which the grantee must establish in order to defeat the government's right to the cancellation of the conveyance which fraud alone is shown to have induced. The rule as to this defense is thus stated in *Boone* v. *Chiles* * * *: "In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the

> denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title * * *. The title purchased must be apparently perfect, good at law, a vested estate in fee simple * * *. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity * * *. Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out."
>
> See also *Northern Colorado Coal Co.* v. *United States*, 234 Fed. 34.

The master was therefore obviously wrong in concluding that the burden was on the government to prove that the purchaser had notice of the fraud, and his erroneous application of the law is in no sense binding upon the court. The Circuit Court of Appeals for the Ninth Circuit in *Home Land & Cattle Co.* v. *McNamara*, 111 Fed. 822, reversed the action of the lower court based on the master's improper application of the law, and in that case the reference was by consent of the parties "to hear the testimony and report the same, together with his conclusions of fact and law to the court."

When we consider how the Curtis, Collins and Holbrook Company acquired title to these lands, it

becomes at once apparent that it sadly failed to meet the requirements of the rule. The company took its deeds from Gregory, but paid him no consideration whatever for the land, and he was not in possession. On the other hand, if, as claimed, the land was purchased from Holbrook, and from Curtis and Collins individually, to whom it is said a consideration was given, still the defense is not established, because neither Holbrook nor Curtis and Collins had the title, nor were they in possession of the land. To be a bona fide purchaser one must purchase by deed from one having the fee simple title. *Vattier* v. *Hinde*, 7 Pet. 252; *Orton* v. *Smith*, 18 How. 263.

(a) *A purchaser who fails to exercise due caution will not be protected.*

Observe the suspicious circumstances surrounding the transfer of title. The lands were all conveyed to Gregory, but the deeds were not recorded. It has been held that the fact that a deed is withheld from record is a badge of fraud. *Linn & Lane Timber Co.* v. *United States*, 196 Fed. 593; affirmed, 236 U. S. 574. No consideration was paid to Gregory, but it is said that one was paid to Holbrook, a stranger to the title. Would a prudent man, acting in good faith, purchase such a title without making further inquiry? And if inquiry had been made the fraud must inevitably have been discovered.

As said by this court in *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, quoting from the Virginia

Court of Appeals in *Burwell* v. *Fauber*, 21 Gratt. 463 (p. 437):

> Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by *actual* but also by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice.

III.

The facts found by the master show affirmatively that the Curtis, Collins and Holbrook Company had notice of the fraud by which the patents were obtained from the government.

Aside from the failure of the defendant corporation to set up and establish the defense of bona fide purchaser, and aside from all suspicious circumstances calculated to put the company on inquiry, we contend that the facts actually found by the master show that the company had notice of the fraud through its manager and vice president Holbrook.

The master found that the entries were made under prior agreements between the entrymen and Tuman, or his agents, to sell the land to such person as Tuman might name at a profit of not less than $100; that Tuman was at that time in partnership with Holbrook for the purpose of dealing in these lands; that the entrymen conveyed to Gregory, the deed being recorded at the request of Holbrook Junior, acting under the direction of his father; that the deeds were withheld from entry by Holbrook for the purpose of concealing from the Government the fact that so large a number of entries had passed into a single ownership, and that Gregory, by direction of Holbrook, conveyed the land to the company, which conveyance was made in pursuance of the contract entered into between Holbrook and Curtis and Collins in December, 1901. The master further found that in consideration of the conveyance from Gregory to the Curtis, Collins and Holbrook Company the latter issued its stock to Curtis and Collins and they paid to Holbrook a valuable consideration, viz., part in cash and part in stock of the company. Thus, the master would have it appear that Holbrook sold to Curtis and Collins and they in turn sold to the corporation.

We have but little complaint to make of the master's actual findings of fact. It is to the conclusions he draws from those facts that we chiefly object. However, we do complain of the finding that Holbrook sold the lands to Curtis and Collins and they in turn sold to the Curtis, Collins and Holbrook

Company, because this is positively contradicted by the record. The entrymen conveyed the lands to Gregory and the latter, at the instance of Holbrook, conveyed to the company. This was in accordance with the original agreement that Holbrook would have the lands conveyed to the corporation. We know that this was the arrangement, because the greater part of Holbrook's profit was to be paid in stock of the corporation, and unless the company held the title he would have had no protection. Had they done what Holbrook first wanted them to do, namely, buy the lands from him and let him take what profit he could out of the transaction, Curtis and Collins might with some show of truth contend that Holbrook's knowledge could not be rightfully imputed to them. But, as shown, Curtis and Collins did not buy the lands from Holbrook. They organized a corporation to purchase the lands and made Holbrook take an interest in it, and the facts found by the master in this regard show positively that the company had notice through Holbrook.

But if, as found by the master, it can be said that Holbrook sold to Curtis and Collins and the latter to the company, the defense of bona fide purchaser must necessarily fail, because neither Curtis and Collins nor Holbrook ever had the legal title, and they were not in possession of the land. To bring the defense within the rule "it must be averred in the plea or answer and proved, that the conveyance was by deed, and that the vendor was seized of the legal title." *Orton* v. *Smith, supra*. There was no deed

from Holbrook to Curtis and Collins, and none from the latter to the company. The purchaser of an equitable title can not claim to be a bona fide purchaser; he buys subject to all equities. *Boone* v. *Chiles; Wright-Blodgett Co.* v. *United States*, and *Vattier* v. *Hinde, supra.*

The plain, simple truth is that Curtis and Collins agreed with Holbrook to acquire title to public lands of the United States, the two former furnishing the money, and the latter furnishing the knowledge and experience. Holbrook did not own the lands. He told Curtis and Collins the lands belonged to the government, and as he was to devote his time to the scheme of acquiring title, he was allowed to make a profit if he could do so within well-defined limits. For some reason of their own, the parties agreed to form a corporation to take and hold the lands, in which Holbrook was to have an interest in proportion to the profit that he would be able to make. According to Collins's own testimony, it was he who insisted that Holbrook should be one of the "firm." Possibly an explanation of this is furnished by E. S. Collins, who testified that as Holbrook was to have an interest in the corporation, they thought his personal guaranty "would be worth everything to us." (R. 957.)

Tuman, who was in charge in the field, certainly had knowledge of the fraud, and he testified when called for the government, that he kept his partner, Holbrook, fully advised and that the latter knew all that he knew. (R. 482.) He testified to the same effect when called for the defendants. (R. 523.)

Moreover, this is to be inferred from Holbrook's general familiarity with the situation. It was he who suggested that the title might be secured through timber and stone entries. C. H. Holbrook, Jr., was in his father's office and it was through him that the title was taken in Gregory's name. It was through Holbrook, Senior, that the deeds were withheld from record, as he had entire charge of the handling of the deeds (R. 965), and the master found that this was intended to deceive the government. Holbrook, Junior, testified that he was in the employ of the Curtis, Collins and Holbrook Company, and that he spent practically the entire summer of 1902 in Plumas County, and his father also was there a good part of the time. (R. 1067.) W. C. Lawrence made application for an entry pursuant to an understanding with Remick that the land would be turned over to him for $100. The money to pay expenses of filing and the government price for the land was furnished by Elam, who also gave Lawrence the $100 agreed upon before the entry was allowed. It seems that the entry was cancelled or never allowed, and Lawrence received from the land office the money which had been paid, amounting to something over $400. (R. 1238–1248.) Holbrook, Junior, testified that he went to Lawrence and demanded the money, saying it belonged to his father and that Lawrence had made himself criminally liable by taking it. He testified further that he supposed his father told him to demand the money from Lawrence, but he may have done so on his own responsibility. (R. 1069.)

All this shows that Holbrook, Sr., knew what was going on in the field.

When the corporation was formed Holbrook was made vice president, and the testimony shows that he was in fact the general manager so far as acquiring lands was concerned. Notice to Holbrook was therefore notice to the company, because in no way can notice be given to a corporation except through its agents. In *Washington Securities Co.* v. *United States*, 234 U. S. 76, it was held that a corporation was charged with knowledge acquired by its vice president while acting as agent for another company.

It is claimed that it was to Holbrook's interest to withhold from the company any knowledge he possessed, because he was making a profit out of the transaction, and that the company would not have purchased if he had disclosed his information. It was under this theory that the master, relying on the case of *American National Bank* v. *Miller*, 229 U. S. 517, held that notice to Holbrook could not be imputed to the company. When the relation of the parties is considered this claim is shown to be wholly without foundation. It is true that Holbrook was making a profit out of the transactions, but he was required to put most of that profit back into the corporation. He invested at least to the extent of $90,000. It is absurd to say that the company might not have purchased if Holbrook had disclosed his knowledge of the manner in which the entries had been made, because Holbrook was the company. Everything was left in his hands; indeed, it was

impossible to sell land to the company except through him. (R. 964.)

The rule, that if the agent is acting in a matter in which he has a personal interest the presumption is that he will not communicate the facts to his principal, was considered by this court in the case of *McCaskill Co.* v. *United States*, 216 U. S. 504, and the soundness of the rule admitted; but it was said that while the presumption should be enforced to protect a corporation, it should not be carried so far as to enable a corporation to become a means of fraud or a means to evade its responsibility. In that case the court cancelled the patent, holding that the knowledge of J. J. McCaskill, the president of the company, was imputed to the company, notwithstanding there was nothing to show that Robert E. L. McCaskill, the other incorporator and secretary of the company, had any actual knowledge of the fraud.

In *United States* v. *Kettenbach*, 208 Fed. 209, Kettenbach, Kester and Robnett had procured the making of unlawful entries in their own interest. One of the entries had been conveyed to Robnett, who in turn conveyed it to the Lewiston National Bank, in which he was employed as a bookkeeper, and of which Kester and Kettenbach were cashier and president, respectively, and had complete charge of the bank's affairs. In that case it was contended that the bank was an innocent purchaser. But that contention was rejected by the Court of Appeals for the Ninth Circuit, which held that the bank was

chargeable with the knowledge possessed by its officers who had full charge of its affairs. Just as Kettenbach and Kester had full charge of the bank's affairs in the case cited, so did Holbrook have entire charge of the affairs of the Curtis, Collins and Holbrook Company in so far as the purchase of lands was concerned.

To the same effect was the decision of the Court of Appeals in *Wilson Coal Co.* v. *United States*, 188 Fed. 545, where it was held that notice to the incorporators was notice to the corporation, and that innocent stockholders were also bound by such notice, upon the theory that shareholders in a corporation are not co-owners, as the title rests in the legal entity called the corporation.

These cases are clearly distinguishable from the case of *American National Bank* v. *Miller*, 229 U. S. 517, which followed the rule that notice to an agent of a corporation would not be imputed to the corporation when the agent is acting in his own interest. In that case the transaction was handled by officers of the bank who the court found had no knowledge of the insolvency of the president, and consequently the president's own knowledge was not imputed to the corporation. But in the *Kettenbach* and *Wilson Coal Co.* cases the officers who had the information were the very ones who conducted the transactions. So here, the entire matter of the purchase of lands was left to Holbrook and he alone acted for the company, consequently notice to him was necessarily notice to the corporation.

To say that Holbrook's knowledge may not be imputed to the company is tantamount to saying that the company could not possibly have been given notice, because, as we have seen, everything was left to Holbrook, who, in the language of E. S. Collins, was "running the company" and through whom the company purchased its lands. Will the company be permitted to say that Holbrook was its agent, to determine that the titles to the lands were good and that the lands were of the character desired by the company; that he was authorized to buy lands for the company and to accept title deeds therefor, the custody of which was placed in his charge, and then be heard to repudiate his agency when it comes to a matter of notice? Possibly, barely possibly, some of the stockholders, especially J. G. Curtis, who did not appear to know much about the situation, did not have actual knowledge of the fraud. But that is no defense. The corporation held the title and the taint affects even the remotest stockholder. In the case of *Kettenbach, supra*, it was not even claimed that all of the stockholders, or even all the officers of the bank had notice of the fraudulent character of the entry which Robnett sold to the bank, yet the Court of Appeals held the bank chargeable with notice and canceled the patent.

It must not be overlooked that there was no way of dealing with this company so far as selling the lands to it was concerned, except through C. H. Holbrook. He was "running the company" (R. 959), passing upon the deeds, the character of the

lands, etc., and it was left to him to say when the deeds should be recorded. (R. 948.) It would be difficult to find a plainer case where notice to the agent was notice to the corporation.

There is something inherently wrong in the proposition that two men may advance money to a third for the purpose of conducting an enterprise and reap all the benefits and advantages therefrom, and at the same time incur no liability and escape all responsibility. We repeat there is something radically and inherently wrong in such a proposition, and we know it is not the law. While the courts will protect a corporation so far as they may, they will look beyond the corporate form to the individuals composing it and not allow the corporation to be used as a means of fraud or to escape liability.

The entire situation may be summarized as follows: Curtis and Collins entered into an agreement with Holbrook to acquire title to public lands, the former two furnishing the money and the latter his knowledge and experience. As he was devoting his time to the undertaking, Holbrook was permitted to make a profit; this, however, was to be within well-defined limits. Curtis and Collins knew that the land was timberland and that title could be properly obtained for it only under the timber and stone laws. The only way in which Holbrook could acquire title was to induce other entrymen to make entries for his benefit. They formed a corporation to take and hold the lands, and Holbrook was given an interest in it. This was not wholly philanthropic on the part of

Curtis and Collins, because they wanted Holbrook's personal guaranty as well as the benefit of his knowledge and experience, and his personal guaranty became valuable only in proportion to his interest in the company, because he was "broke" at the time. (R. 1064.) Curtis and Collins knew that the method by which title was to be acquired was, to say the least, questionable and uncertain. (R. 980.) Yet they placed Holbrook in entire charge of the matter and left everything in his hands. They also knew of Tuman's connection with the matter. (R. 504.) As has been said of the restrictions in the coal-land law, *Wilson Coal Co.* v. *United States, supra*, so it may be said of the restrictions in the timber and stone laws, they were placed there to prevent anyone from acquiring a monopoly in the lands. But this company has attempted to ignore the restrictions and to acquire a monopoly in spite of the law.

When, as they had reason to suspect it would, the scheme proved to be grossly illegal and fraudulent, and the fraud was brought to light, they attempted to hide behind the corporation that was formed for the purpose of holding the lands and whose management and control they had placed wholly in Holbrook's hands, who, besides being vice president and manager of the company, had a substantial interest in it. He owned at least $90,000 worth of the stock. Holbrook certainly had knowledge of the fraud. The master finds this, in effect, because he finds that Holbrook withheld from record the entrymen's deeds to Gregory for the purpose of

concealing the truth from the Government, and that he was Tuman's partner in dealing in these lands. Moreover, Holbrook was opposed to defending the contested entries in the land office. (R. 568.) Neither he nor Collins desired the publicity of a trial on any of the claims that they had purchased. Collins let some $15,000 or $20,000 worth of lands go without offering any defense. He did not even demand a settlement with Holbrook, with whom he claims to have been dealing at arms length. Is this the act of an innocent man who has no knowledge of any fraud? It needs no stretch of the imagination to find that Collins too was fully informed regarding the entire situation. But it is immaterial whether Collins had actual knowledge or not. Holbrook certainly had knowledge, and he was in full charge of the company's affairs.

CONCLUSION.

The burden is upon the defendant corporation to prove that it was a bona fide purchaser. In an effort to establish this defense the company claims that Curtis and Collins purchased from Holbrook, and that they had no notice of fraud and consequently could give the company a good title. Unfortunately for this claim it is flatly contradicted by the record, which shows that the company purchased from Gregory, who was a mere dummy. Moreover, Holbrook had no title and gave Curtis and Collins none, and the purchaser of a mere equity

can not claim to be a bona fide purchaser. Thus the defense of bona fide purchaser completely fails.

Aside from this, however, the record affirmatively shows that the company had notice of the fraud through Holbrook, and it is therefore respectfully submitted that the decrees of the Circuit Court of Appeals should be affirmed.

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